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A Selection of Cases

on

TRIAL PRACTICE

At Common Law and Under Modern Statutes

By EDWARD W. HINTON

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CHICAGO

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PREFACE.

From an early period law schools have recognized the importance of pleading and evidence and have offered well organized courses in these subjects, but until recently the law of procedure has been inadequately treated. In most schools, where the subject was noticed at all, it was covered by a lecture course on general practice, or more frequently, the practice of a particular jurisdiction, supplemented by more or less unsatisfactory work in a "moot court" of some sort.

Several causes were responsible for this condition of affairs. First, the absence of any text adapted to class room needs; second, the tendency to confuse the law of practice with the art of advocacy, a subject difficult, if not impossible, to teach by ordinary methods; third, the assumption that practice was essentially a local matter, to be picked up in the office and court room after graduation. The result was that graduates came to the bar well trained in the substantive branches of the law, but practically untrained in the law of procedure. It is not surprising, therefore, that cases were badly tried and the records filled with errors, resulting in a general demand for a reform of the practice. No doubt this part of the law may be vastly improved, but the editor is skeptical as to the success of "simplified procedure" without adequately trained men to administer it, or as to any real reform, not based on thorough understanding of the system that has come down from the common law, modified by patchwork legislation.

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CHAPTER I.

PROCESS.

Section 1. Form and Requisites.

(a) *Summons.*

A writ is a latin letter of the king's, from thence in parchment sealed with his seal. All writs have a salutation, Rex to such a one *salutem*, and a conclusion expressing the name of the one which is witness to the writs, called Teste (who in writs out of the chancery is the king himself; in other writs the chief justice of the place) the place, as *apud Westmonasterium*, etc., and the time, both day and year of the making of it, if it be returnable, the day of the return is also appointed in it.[1]

WRIT IN DEBT.

George the Third, etc. To the sheriff of....., greeting:

Command C. D., late of ....., that justly and without delay he render to A. B. the sum of £.... of good and lawful money of Great Britain, which he owes to, and unjustly detains from him, as it is said; and unless he shall so do, and if the said A. B. shall make you secure of prosecuting his claim, then summon by good summoners, the said C. D. that he be before us, on ..... wheresoever we shall be in England, (or, in C. P. before our justices at Westminster, on .....,) to shew wherefore he hath not done it, and have there the names of the summoners, and this writ. Witness ourself, etc. L. S.[2]

[1] Finch's Law, Book IV, p. 237. [2] Tidd's Appendix, 20.

"The first process, or proceeding upon the original writ, in actions of account, convenant, debt, annuity and detinue, is a summons, or warning to appear according to the exigency of the writ; being nothing more than a copy of the writ itself, made out by the plaintiff's attorney for the sheriff, and delivered by one of his officers to the defendant, or left at the usual place of his abode."[3]

"It was a general rule or maxim of law, that the sanction of the king's original writ, issued out of chancery, was an essential preliminary form to the institution of a suit in the common law courts. *Non potest quis sine brevi agere;*[4] this was the prevailing doctrine. The practice of proceeding by bill without the original writ from chancery, in personal actions and in ejectment, formed an exception to the rule. The practice of commencing an action by bill only obtained in each of the superior courts in the case of certain persons, privileged in regard to their official characters, or as officers of the courts, to be sued as being already present in court. And in the king's bench and exchequer the proceedings by bill in other cases was introduced by fictions, and afterwards sanctioned and legalized by usage. But the great variety of writs and bills led to so much intricacy and confusion, that, as regards personal actions, the former writs, bills, and proceedings were abolished, and the writs of summons, capias, and detainer were introduced by 2W. 4, c. 39, and which writs do not, as formerly, set out the whole form and cause of action, but are only adopted as modes of bringing the defendant into court, and then, and not before, the declaration, stating the full form and cause of action, is delivered."[5]

U. S. COMPILED STATUTES, 1913.

§ 1534. (R. S. § 911.) SEALING AND TESTING OF WRITS. All writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof. Those issuing from the Supreme Court [or a circuit court] shall bear teste of the Chief Justice of the United States, or, when that office is vacant, of the associate justice next in precedence, and those

[3] Tidd's Practice, 2 Am. Ed. p. 103.

[4] See III Blackstone Comm. * p. 272.

[5] Chitty's Pleading, 16 Am. Ed. * p. 106.

issuing from a district court shall bear teste of the judge, or, when that office is vacant, of the clerk thereof. The seals of said courts shall be provided at the expense of the United States.

§ 1535. (R. S. § 912.) TESTE OF PROCESS, DAY OF. All process issued from the courts of the United States shall bear teste from the day of such issue.[6]

§ 1580. (R. S. § 948.) AMENDMENT OF PROCESS. Any [circuit or] district court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure the party against whom such process issues.

§ 1591. (R. S. § 954.) DEFECTS OF FORM; AMENDMENTS. No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe.

ILLINOIS CONSTITUTION AND STATUTES.

All process shall run: In the name of the People of the State of Illinois; and all prosecutions shall be carried on: In the name and by the authority of the People of the State of Illinois; and conclude: Against the peace and dignity of the same. Const. 1870, Art. VI, § 33.

[1. PROCESS—FORM—WHEN RETURNABLE.] § 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* The first process in all actions to be hereafter commenced in any of the courts of record in this State shall be a summons, except actions where special bail may be required;

[6] See also § 1536, set out in Peaslee v. Haberstro, 15 Blatch. 472, *post*, p. 18.

which summons shall be issued under the seal of the court, tested in the name of the clerk of such court, dated on the day it shall be issued, and signed with his name, and shall be directed to the sheriff, (or, if he be interested in the suit, to the coroner of the county,) and shall be made returnable on the first day of the next term of the court in which the action may be commenced. If ten days shall not intervene between the time of suing out the summons and the next term of court, it shall be made returnable to the succeeding term. The plaintiff may, in any case, have summons made returnable at any term of the court which may be held within three months after the date thereof.[7]

[8. SUMMONS.] § 8. Upon the filing of every bill, the clerk of the court shall thereupon issue a summons, tested, dated and sealed as a summons in common law suits, directed to the sheriff of the county in which the defendant resides, if the defendant be a resident of this state, requiring him to appear and answer the bill on the return day of the summons; and where there are several defendants residing in different counties, a separate summons shall be issued to each county, including all the defendants residing therein.[8]

[9. SUMMONS, WHEN RETURNABLE.] § 9. Every summons in chancery shall be made returnable to the next term of the court after the date thereof, or the next succeeding term thereafter.

[10. ALIAS, PLURIES, ETC.] § 10. If, in any suit in chancery, the process shall not be returned executed on or before the return day thereof, the clerk, if required, shall issue an alias, pluries, or other process, without an order of the court therefor.

FORM OF SUMMONS.

State of Illinois, }
Cook County. } ss.

The People of the State of Illinois, to the Sheriff of said County, Greetings:

We command you that you summon ..... if he shall be found in your county, personally to be and to appear before the Superior Court of Cook County, on the first day of the term thereof, to be holden at the Court House, in the City of Chicago,

[7] § 1, Chap. 110, R. S. 1913. General Practice Act.

For corresponding provisions in Missouri, see Const. 1875, Art. VI, § 38, and §§ 1756, 1757, 1759, R. S. 1909.

[8] Chap. 22, R. S. 1913. Chancery Practice Act.

in said Cook County, on the first Monday of January next, to answer unto ..... in a plea of trespass on the case upon promises, to the damage of said plaintiff, as it is said, in the sum of twenty-five hundred dollars.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness, ..., Clerk of our said Court, and the Seal thereof, at Chicago, aforesaid, this 1st day of December, A. D., 1914.

{ Seal of the Superior Court of Cook County } ..... Clerk.

WISCONSIN STATUTES, 1911.

[2629. JURISDICTION, HOW ACQUIRED.] § 2629. A civil action in a court of record shall be commenced by the service of a summons. From the time of such service or the issuance of a provisional remedy the court shall be deemed to have acquired jurisdiction and to have control of all subsequent proceedings.

[2630. SUMMONS, CONTENTS OF.] § 2630. The summons shall contain:

(1) The title of the cause, specifying the name of the court in which the action is brought, the name of the county designated by the plaintiff as the place of trial, and the names of the parties to the action, plaintiff and defendant.

(2) A direction to the defendants summoning them to appear within twenty days after service of the summons, exclusive of the day of service, and defend the action.

(3) A notice that in case of failure so to do judgment will be rendered against them according to the demand of the complaint. It shall be subscribed by the plaintiff or his attorney with the addition of his postoffice address, at which papers in the action may be served on him by mail. There may, at the option of the plaintiff, be added at the foot, when the complaint is not served with the summons and the only relief sought is the recovery of money, whether upon tort or contract, a brief notice specifying the sum to be demanded by the complaint.

[2631. FORM.] § 2631. Such summons[9] shall be substantially in the following form:

[9] The summons provided by the Wisconsin code is not technically treated as process, though it serves the same purpose, Porter v. Vander-

.....Court .....County.

A. B., Plaintiff
vs.
C. D., Defendant.

The State of Wisconsin, To the said defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above entitled action in the court aforesaid; and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint, of which a copy is herewith served upon you.

E. F., Plaintiff's Attorney.
P. O. address ..... County, Wis.

If the complaint be not served with the summons the words "of which a copy is herewith served upon you" may be omitted or erased.

DOAN v. BOLEY.

38 Missouri, 449. [*1866.*]

WAGNER, Judge, delivered the opinion of the court. Plaintiffs instituted suit in 1862, in the Jefferson County Circuit Court, against the defendants, on a promissory note. A summons in the usual form, except that it did not run in the name of the State of Missouri, was issued and served upon the defendants. There was no appearance on the part of the defendants, and judgment was duly given against them in behalf of the plaintiffs. The summons commenced, "To the sheriff, etc.," and not "The State of Missouri to the Sheriff," as prescribed by the Constitution, and this is the only error urged for a reversal. It is insisted by the counsel for the defendants in error, that as no exceptions were taken, or motion made for a new trial, in the court below, this court cannot take cognizance of the matter

cook, 11 Wis. 70; see also McKenna v. Cooper, 79 Kans. 847, *post*, p. 28. But summons from a Federal court sitting in Wisconsin is governed by the Federal Statute, Middleton Paper Co. v. Rock River Co., 19 Fed. 252.

here. In the case of Bateson v. Clark, 37 Mo. 31, the distinction between what is properly matter of error and exception was briefly examined and pointed out, and the rule laid down, that error apparent on the face of the record, which includes the pleadings, summons and judgment, may be taken advantage of by writ of error in this court whether any motion was made or exceptions taken in the court below or not.

It is not contended that the writ was entirely void by reason of not running in the name of the State, but that it was simply voidable.[1] Undoubtedly it would have been quashed on motion

[1] McGrath, J., in Forbes v. Darling, 94 Mich. 621 (1893): The validity of the foreclosure proceeding is attacked on the ground that the subpoena issued in the cause, and returned as served, was not styled, "In the Name of the People of the State of Michigan." The subpoena was returned, served, but Francina Forbes did not appear, and the bill was taken as confessed. The statute (§ 7290) provides that the style of all process from courts of record in this State shall be, "In the Name of the People of the State of Michigan." Section 35 of article 6 of the Constitution provides that the style of all process shall be, "In the Name of the People of the State of Michigan." In Tweed v. Metcalf, 4 Mich. 579, and again in Wisner v. Davenport, 5 Id. 501, it was insisted that certain tax rolls were void, because the warrant to the township treasurer was not styled, "In the Name of the People of the State of Michigan;" but the Court held that the common-law definition of the term "process" is a writ issued by some court or officer exercising judicial powers, and, further, that the term "process" was intended to mean writs issued in the exercise of that judicial power created and established by the Constitution.

In Johnson v. Insurance Co., 12 Mich. 216, the objection was made that the *scire facias* was not tested, "In the Name of the People of the State of Michigan." The Court held that neither the Constitution nor the statute required the writ to be so tested; that the objection, which was a purely technical one, was itself insufficiently taken; and that it was therefore unnecessary to determine whether the Constitution could be satisfied by a substantial compliance therewith. There the *scire facias* was styled as follows: "The People of the State of Michigan;" and the Court held that the fact that the words "In the Name of the People of the State of Michigan;" were inserted in the Constitution between inverted commas favored the idea that the phrase must be used verbatim.

In the present case the caption of the process was as follows:

"State of Michigan.

"The Circuit Court for the County of Newaygo, in Chancery."

"To Francina Forbes—Greeting."

This is not even a substantial compliance with this provision of the Constitution. The object of this provision undoubtedly is to make this style the distinguishing feature of all process. The requirement is

in the court below, or it might have been amended on a direct application for that purpose. It has been held that the provisions of the State Constitution requiring all writs and process to run in the name of the State of Missouri is merely directory, and therefore an omission to comply with the requirements would be merely irregularity—Davis v. Wood, 7 Mo. 162. Now the statute declares that when a verdict shall have been rendered in any cause, the judgment thereon shall not be stayed, nor shall the judgment upon such verdict, or any judgment upon confession, *nihil dicit*, or upon failure to answer, be reversed, impaired or in any way affected for any default or defect of process. The process here was certainly defective; it might have been taken advantage of at the proper time, but, as the parties did not avail themselves of the defect, it is cured by virtue of the statute.—R. C. 1855, p. 1255, § 19.

The other judges concurring, the judgment will be affirmed.

CASE v. HUMPHREY.

6 Connecticut, 130. [*1826.*]

This was an action on the case, for a false return of a writ of attachment against the plaintiff. The declaration stated, That on the 16th of September, 1823, a writ of attachment was issued, in favour of Benjamin Weed, against the plaintiff, on a promissory note; that it was directed to the defendant, as an indifferent person, by Benjamin Weed, jun., a justice of the peace, who signed the writ; that it was delivered to the defendant to execute; that the plaintiff had a good defence to the action, of which he had neither notice nor knowledge; but that the defendant fraudu-

constitutional, and the defect jurisdictional.

The decree below must therefore be reversed, and defendants enjoined from proceeding to sale under the decree for foreclosure, without prejudice, however, to any subsequent proceedings to foreclose said mortgage.

Complainants are entitled to the costs of both courts.

The other justices concurred.

In State Bank v. Buckmaster, 1 Ill. 176 (1826), it was held that such an omission might be supplied by amendment after motion to dismiss.

lently indorsed upon the writ, that he had made service of it, and returned it to the county court of Hartford county, to which it was returnable; that at the term of that court, in November, 1823, Benjamin Weed recovered judgment against the plaintiff, by default; and that by execution issued upon the judgment, the plaintiff's property was subsequently taken and sold.

The cause was tried, upon the issue of not guilty, at Litchfield, February term, 1826, before Hosmer, Ch. J.

The trial judge excluded the record of the judgment and directed a verdict for defendant. Plaintiff moved for a new trial.

HOSMER, Ch. J. No doubt can be entertained, that the plaintiff's declaration was sufficient to withstand a demurrer; and that he has done what it was necessary he should do; and that is, he has averred, that the writ was lawfully directed to the defendant, as an indifferent person, and that a lawful judgment was rendered upon it.

Did the testimony offered sustain this allegation?

The writ in question was directed to the defendant, as an indifferent person; and the justice who administered the preliminary oath, certified in the following terms: "Personally appeared Samuel Weed, and made solemn oath, that he verily believed the plaintiff to be in danger of losing the within described debt, unless an indifferent person be deputed for the immediate service of the writ."

The law requires, if a sheriff or constable cannot be obtained to serve process, that before the direction of it to an indifferent person, an affidavit, in certain prescribed words, shall be made, by the plaintiff, or his agent, and the same shall be certified on the writ. Stat. p. 35.

Certain positions relating to this subject are perfectly incontrovertible.

The certificate of the justice, regarding the administration of the oath, is the only source of evidence to which the court can recur. From this it must appear, at least by reasonable construction of the words of it, and not from conjecture, presumption or any thing *de hors*, that the prerequisites of the law have been complied with. Stanton v. Button, 2 Conn. Rep. 527. The oath must be administered, in the prescribed words of the law, and not in what the justice may, perhaps, very erroneously, consider equivalent expressions; and from his certificate this

must appear. It likewise must appear that the person making affidavit was the plaintiff in the suit or his agent. The service of writs, in general, is required to be made by a known public officer; and it is no unwarrantable inference that the protection and security of the citizen are interested in the prevention of any unnecessary departure from this principle. The plaintiff's declaration, if the facts are stated truly, is an illustration and proof of this position. The direction of a writ to an indifferent person is an exception from the general rule; and all exceptions from the common principle are to receive a strict construction.

To the direction of the writ in question there are two decisive objections. In the first place, the oath was administered to Samuel Weed, who certainly was not the plaintiff in the suit; nor is it said that he was his agent. He was a stranger, incapable of making a legal affidavit. The law is peremptory, that the oath shall be made, by the plaintiff, or his agent; and he was neither. It cannot be presumed, as there is nothing from which a presumption can be made, that he was authorized by the plaintiff; unless we admit, to aid the justice's certificate, that all mankind were his agents: for every man in the community, from the nature of the case, is equally within the scope of this liberal conjecture.

There is a second objection precisely as fatal to the legality of the direction. The justice has not certified that he administered the oath prescribed by law; but that the deponent swore to something, which the justice considered of the same import.

The direction of the writ not being legal, the indifferent person was, in no sense, an officer, nor invested with authority to make service. There being no service, nor even possibility of it, under the illegal direction, the judgment of the court was extra-judicial and void. The jurisdiction of a court, if it extend to the parties and subject matter, when legally before them, can never be called into exercise, unless through the medium of a process, complete in law, and duly served; or in other words, the court must first have cognizance of the process before it can do any legal act in the cause. Grumon v. Raymond et al. 1 Conn. Rep. 40. Between a writ not duly directed to an indifferent person, and one that has no direction in fact, there is no legal difference.

It results, most clearly, that the evidence offered, of a writ not lawfully directed, of a judgment in fact only, and not in law, did not sustain the averment, that a writ was legally directed,

or that a judgment was legally rendered; and for this reason, it was correctly repelled.

The plaintiff has contended that it is too late for the court to act upon the objections to the writ and judgment, which have been discussed.

He first insists that the only remedy for the unauthorized direction of the writ was by plea of abatement; and to sustain this position he relies on the words of the statute, p. 35, that, "if any writ, etc. shall be directed to an indifferent person, except in the cases and under the regulations above mentioned, it shall abate." The law, most manifestly, has been misconceived by the confounding of two expressions of a very different meaning. It is not said that the defendant shall take his redress by plea of abatement, but that the writ shall abate. This is a generic term, derived from the French word *abattre,* and signifies to quash, beat down, or destroy. 3 Black. Comm. 168. The modes of abatement are various, but the thing is simple and uniform. A plea of abatement is one mode of quashing a writ, but it is not the only one. Sometimes it is the duty of the court to abate the writ ex officio, and the instances where this is the legal and proper remedy are numerous. Where a writ is nullity, so that judgment thereon would be incurably erroneous, it is *de facto* abated. Earl of Clanrickard's case, Hob. 288. Case of Fines, 3 Rep. 85. Hughson v. Webb, Cro. Eliz. 121. Cooke v. Gibbs, 2 Mass. Rep. 193. Wood v. Ross, 11 Mass. Rep. 271. And even the explicit admission of its validity by the party never concludes the court. In the case before us, it never could have been the intention of the legislature to suspend the remedy on a plea of abatement, but to enjoin on the court that a writ, incomplete, without direction to a person who could serve it and attended with a defect, palpable, fatal and unamendable, should be quashed. Eno v. Frisbie, 5 Day, 127. When they declared that such writ shall abate, the term was used in its most comprehensive sense, not prescribing a mode, but commanding the thing in a manner the most absolute and imperious.

If, however, the law had prescribed that the writ should be dismissed, on plea of abatement, it would have made no difference in the case. The prescription of one mode of redress, where the common law gives another remedy, does not operate a repeal of the common law if there is no inconsistency between them; but they shall both have a concurrent efficacy. Dr. Foster's case, 11

Rep. 63. 1 Black. Com. 89. The common law must be negatived by the statute or the matter must be so clearly repugnant as to imply a negative in order to effect a repeal of it.

The result on this part of the argument is, that the statute has not required a plea of abatement in the case supposed; and if it had, it would not take away the common law remedy.

New trial refused.

OAKLEY *qui tam* v. GILES.

3 East, 167. [*1802.*]

In action to recover penalties on a statute, the defendant was served on the 3d of November with a copy of process in the name of William Giles, his true name being Edward; in consequence of which he did not appear, but the plaintiff afterwards served him with notice of declaration by his right name, and proceeded to judgment against him for want of a plea, and sued out execution last night.

Park thereupon moved to set aside the proceedings for irregularity, and cited Doe v. Butcher (3 T. R. 611) and Corbett v. Bates (3 T. R. 660), in which the distinction was taken in this respect, where the defendant himself appears when sued by a wrong name, and where the plaintiff enters an appearance for him, according to the statute by his right name; in the latter case the defect is not cured, and the Court will set aside the subsequent proceedings for irregularity.

The Court, however, refused a rule; saying that the defendant having been the real person served with the process, ought to have pleaded in abatement, and could not take advantage of the misnomer in any other manner than that which the law had marked out: if this were allowed, pleas in abatement for a misnomer might be struck out of the books.

Park, at the close of the day renewed his motion, and obtained a rule *nisi* for setting aside the proceedings on payment of costs, upon a further affidavit, stating that the defendant's attorney had been misled by the authorities and books of practice, and had advised the defendant not to appear and defend himself against what was deemed to be nugatory process; and also swearing to merits.

GILL v. HOBLIT.

23 Illinois, 420. [*1860.*]

Writ of error to a judgment by default.

Mr. Chief Justice CATON delivered the opinion of the Court: We are asked in this case to reconsider the question decided in Orendorff v. Stanberry, 20 Ill. 90. The judgment was rendered against Gill, the plaintiff in error, by the Logan Circuit Court, upon a summons issued by the clerk of that court, as follows:

"The State of Illinois } sct.
Logan County }

"The People of the State of Illinois to the Sheriff of Cook County:

"We command you that you summons George Michael and Elijah Wicklin and Richard T. Gill, if they shall be found in your county, personally to be and appear before the Circuit Court of said county, on the first day of the next term thereof, to be holden at the Court House in Lincoln, on the third Monday in the month of September next, to answer Samuel Hoblit in a plea of assumpsit, to his damage, $600, as he saith; and have you then and there this writ and make return thereon in what manner you execute the same.

Witness J. C. Webster, Clerk of our Circuit Court at Lincoln, this 21st day of August, in the year of our Lord one thousand eight hundred and fifty-seven.

(SEAL) Teste J. C. WEBSTER, Clerk of Circuit Court."

This summons was returned by the sheriff of Cook County served on Gill; the other defendants not found. Where was the defendant below commanded to appear and answer the complaint of the plaintiff? The summons was directed to the sheriff of Cook County, who was commanded to summon the defendants, if they should be found in his county, to appear before the circuit court of said county, at the court house in Lincoln. There can be no dispute that the county of the sheriff to whom the summons was directed, was Cook County. In that county he was commanded to search for the defendants, and if found there, to summon them to appear before the Circuit Court of that county. If the sheriff obeyed the command of the writ, he summoned Gill to appear before the Circuit Court of that county. His return shows that he served the writ as he was commanded by it. Had he

summoned the defendant to appear before the Logan Circuit Court, he would have disobeyed the mandate which he had received, and for that reason the act would have been void. Where then was the defendant bound to appear? Not in Logan County surely, for he was not required to go there, but before the Circuit Court of Cook County, to be holden at Lincoln, and when he could find no such place in that county, he was not bound to seek another court in a different county. It was not a matter of doubt even, as was urged upon the argument, whether he should appear before the Cook or the Logan Circuit Court, which doubt he was bound to solve by hunting up Lincoln, in Logan County, and there appearing. He was no more bound to go into Logan County, than he was into Peoria. He was bound to obey the summons, or if that was impossible, he was bound to do nothing. But the summons was in fact void, for it contained a mandate to the defendant which he was not bound to obey, and which, in fact, it was impossible for him to obey. We adhere to our former decision, and reverse the judgment and remand the cause.

Judgment reversed.[1]

PARSONS v. SWEET.

32 New Hampshire, 87. [*1855.*]

The original writ in this action, dated March 24, 1855, was made returnable to the Court of Common Pleas, May term, 1855, and bore the teste of John J. Gilchrist, Esquire. At the first term in the Common Pleas the defendants pleaded in abatement of the writ that it did not bear the teste of the chief, first, or senior justice of that court. To this plea the plaintiff demurred, and the plea was adjudged to be bad on account of defect in form. At the second term in the Common Pleas the defendants moved that the writ be quashed for the same cause that had before been pleaded in abatement, and the motion was denied.

[1] And so where summons required defendant to appear at a time already past, Hendricks v. Pugh, 57 Mich. 157; Bobb v. Graham, 4 Mo. 222, where summons did not fix the time for appearance.

No evidence was offered on the motion. On the 24th of March, 1855, John J. Gilchrist, Esquire, was not in fact chief, first or senior justice of the Court of Common Pleas, he having before that time resigned his office of chief justice of that court and of the Superior Court.

PERLEY, C. J. The Constitution of New Hampshire, article 87, provides that "all writs issuing out of the clerk's office in any of the courts of law, shall be in the name of the State of New Hampshire; shall be under the seal of the court whence they issue, and bear the teste of the chief, first, or senior justice of the court, and shall be signed by the clerk of said court."

Provisions of the Constitution are to be interpreted by the same rules that are applied in the construction of similar provisions in statutes; and the party that would avail himself of any provision in the Constitution must do it in the same manner and in the same time and order, that would be required in cases of like provisions in statutes. Ripley v. Warren, 2 Pick. 594; Marston v. Brackett, 9 N. H. 336, 349.

Before the Revolution all writs in the Province of New Hampshire were in the king's name; and probably when the change was first made, by substituting the name of the State for the regal style, one object was to avoid all appearance of recognizing the royal authority. If beyond this there is any design to give authenticity and credit to legal process, by requiring an actual attestation of the chief, first, or senior justice of the court, the practical construction which has uniformly been put on this provision of the Constitution has wholly defeated that object; for the ordinary process of the court never in fact bears the actual signature of the chief justice, but his name is printed into the blank writs before they are delivered out of the clerk's office. The teste of the writ is therefore in practice a mere matter of form.

A writ which issues without the proper teste is not in terms declared by the Constitution to be void, and we think is not to be held so by construction. In the same article of the Constitution writs are required to be signed by the clerk, but a writ is not void because it wants the signature of the clerk, and the objection will be overruled, if not seasonably made. Lovell v. Sabine, 15 N. H. 37.

In Massachusetts, upon the construction of a similar provision in their Constitution, it has been decided that the want of a

proper teste is mere matter of form, and must be taken advantage of by seasonable objection otherwise it will be held to have been waived. Ripley v. Warren, 2 Pick. 592.

In this case the want of a proper teste did not make the writ void. The plea in abatement was defective in form, and overruled. The motion to quash the writ was addressed to the discretion of the court, and that discretion was properly exercised by denying the motion. As a general rule, a motion to quash a writ for a cause which might be taken advantage of by plea in abatement, must be made within the time limited for filing pleas in abatement. Trafton v. Rogers, 13 Maine 315.

Our practice requires such pleas to be filed within the first four days of the first term, and the Court of Common Pleas were well warranted in holding that the defendants had waived their right to insist on the objection, by neglecting to make the motion until the second term.

Even if the plea in abatement had been sufficient, or the motion to quash had been seasonably made, the writ might have been amended, for it was not void, and the court had jurisdiction; as we understand to have been held in Reynolds v. Damrell, decided in Hillsborough County, July, 1849, and not reported.

We have not overlooked the case of Hutchins v. Edson, 1 N. H. 139, in which it was held that a writ of execution, not under the seal of the court, was void. The general language used in that case might tend to the conclusion that writs of mesne as well as final process, were void, unless under the seal of the court. It is obvious, however, that there is an important distinction between the two kinds of writs, because to a writ of final process the defendant has no opportunity to object, by plea or motion, that it wants a seal or other constitutional requisite; whereas in the case of mesne process he may plead the defect, or make it the ground of motion; and it may perhaps be found, when a case shall arise which presents the question, that the doctrine of Hutchins v. Edson ought not to be extended beyond the point expressly decided. Foot v. Knowles, 4 Met. 386; Brewer v. Sibbley, 13 Metcalf 175; People v. Dunning, 1 Wendell 17; Jackson v. Brown, 4 Cowen 550.

GARLAND v. BRITTON.

12 Illinois, 232. [*1850.*]

This was a bill to foreclose a mortgage. The process served was not attested by any seal. At the return term the bill was taken for confessed, and a decree was entered by Treat, Justice, at November term, 1847. The plaintiff in error now seeks to reverse the judgment of the Circuit Court and assigns for error the want of a seal to the summons.

TREAT, C. J. This was a suit in chancery to foreclose a mortgage. The summons issued and served on the defendant was not under the seal of the court. The bill was taken for confessed, and a decree of foreclosure entered. The defendant sued out a writ of error. The statute declares that "all process issuing from the said Circuit Courts shall be sealed with the judicial seal which shall be provided for that purpose; but in case there shall not be a judicial seal the clerk shall affix his private seal until a public one shall be provided." R. S., ch. 29, sec. 40. This statute is imperative in its requirements. If a court has a judicial seal it must be affixed to all of its process; if it has not, the clerk must use his private seal, but he ought in such case to certify that no public seal has been provided, for the presumption is that every court has a seal. The writ in this case did not purport to be under the seal of the court nor the private seal of the clerk. It was, therefore, without validity, and the service of the same was without effect. The defendant not being before the court, by the service of process, or by appearing in the case, the decree was unauthorized and must be reversed. See Hannum v. Thompson, 1 Scammon, 238, and Anglin v. Nott, ibid, 395.

Decree reversed.[1]

[1] Semble, same result in case summons is not signed by the clerk, Hernandes v. Drake, 81 Ill. 34. In Choate v. Spencer, 13 Mont. 127, a judgment by default was held subject to collateral attack where the summons was not sealed. In Insurance Co. v. Hallock, 6 Wall. (U. S.) 536, an unsealed order of sale was held void.

But see, Strong v. Catlin, 3 Pinney, 121, *post* 188.

RUDD v. THOMPSON.

22 Arkansas, 363. [*1860.*]

Mr. Chief Justice ENGLISH delivered the opinion of the court.

The defendants in error recovered a judgment by default, in the Desha Circuit Court, against the plaintiffs in error for $25,000 debt and $1,500 damages.

The counsel for the defendants admits that the recovery, upon the declaration, was excessive, offers to remit the excess, and asks an affirmance under the rule, etc.

But two objections are taken to the writ, which are founded in fact, as it appears in the transcript before us: 1st, that it has no seal, and 2nd, that it was directed to Henry Smith, the sheriff, and was served and returned, as appears from the return endorsed by Thomas McKallister, the coroner of the county.

1. It has been the practice of this court to reverse judgments by default in cases where the summons was without the official seal of the clerk, and such writs were treated as void. But in Mitchell v. Conley, 13 Ark. 418, the court, upon a review of its previous decisions, held that writs were not void for such defects, but voidable, and that the court below possessed the power to amend them on application.

Here no application was made to amend, and the defect in the writ is cause of reversal.

2. The writ being directed to the sheriff, the coroner had no authority to execute it. Hughes v. Martin, 1 Ark. 386. If the sheriff was disqualified to serve the writ, there should have been an affidavit of the fact, and the writ directed to the coroner. Gould's Dig., chap. 38, sec. 7, 8; 14 Ark. 59.

The judgment must be reversed, the cause remanded and the plaintiff in error must be regarded as in court under the rule, etc.

PEASLEE v. HABERSTRO.

15 Blatchford (U. S. C. C.), 472. [*1879.*]

WALLACE, J. The motion to set aside the summons in this action must be granted, upon the ground that the summons was

not signed by the clerk or under the seal of the court. Section 911 of the Revised Statutes of the United States prescribes, that "all writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof." This provision is not inconsistent with, and therefore, is not repealed by, the subsequent Act of Congress (Act of June 1st, 1872, § 5, 17 U. S. Stat. at Large, 197), now embodied in section 914 of the Revised Statutes, which enacts that "the practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held." Giving due effect to the later act, the practice, and forms and modes of proceeding, in the courts of the United States, in common law actions, is to conform to, and be regulated by, that of the state courts, when there is no statute of the United States prescribing different practice or forms or modes of procedure. When the statutes of the United States are silent, the practice of the state courts will prevail, but, when those statutes speak, they are controlling. If the summons in this case had been signed by the clerk, it could be amended as regards the seal.[1] As it is, there is no summons in the nature of process known to this court. The summons is set aside.

(b) *Notice.*

U. S. COMPILED STATUTES, 1913.

§ 1039. (JUD. CODE, § 57.) ABSENT DEFENDANTS IN SUITS TO ENFORCE LIENS, REMOVE CLOUDS ON TITLES, ETC. When in any suit commenced in any District Court of the United States

[1] See Jump v. McClurg, 35 Mo. 193, allowing an amendment of an unsealed writ of attachment. See also, Redmond v. Mullinax, 113 N. C. 505; Baker v. Swift, 87 Ala. 530. At common law, signing by the filazer does not appear to have been necessary. Frost v. Eyles, 1 H. Bl. 120.

to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same state, such suit may be brought in either district in said state; Provided, however, that any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said District Court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.

REVISED STATUTES OF MISSOURI, 1909.

§ 1770. ORDERS OF PUBLICATION. In suits in partition, divorce, attachment, suits for the foreclosure of mortgages and deeds of trust, and for the enforcement of mechanics' liens and all other liens against either real or personal property, and in all actions at law or in equity, which have for their immediate object the enforcement or establishment of any lawful right, claim or demand to or against any real or personal property within the jurisdiction of the court, if the plaintiff or other person for him shall allege in his petition, or at the time of filing same, or at any time thereafter shall file an affidavit stating, that part or all of the defendants are non-residents of the state, or is a corporation of another state, kingdom or country, and cannot be served in this state in the manner prescribed in this chapter, or have absconded or absented themselves from their usual place of abode in this state, or that they have concealed themselves so that the ordinary process of law cannot be served upon them, the court in which said suit is brought, or in vacation the clerk thereof, shall make an order directed to the non-residents or absentees, notifying them of the commencement of the suit, and stating briefly the object and general nature of the petition, and, in suits in partition, describing the property sought to be partitioned, and requiring such defendant or defendants to appear on a day to be named therein and answer the petition, or that the petition will be taken as confessed. If in any case there shall be sufficient time to make publication to the first term, the order shall be made returnable to the next term thereafter, that will allow sufficient time for such publication.

§ 1772. PUBLICATION TO ISSUE ON RETURN OF NON EST. When, in any of the cases contained in section 1770, summons shall be issued against any defendant, and the sheriff to whom it is directed shall make return that the defendant or defendants cannot be found, the court, being first satisfied that process cannot be served, shall make an order as is required in said section.[1]

[1] For corresponding provisions in Illinois and Wisconsin, see Illinois, R. S. 1913, Chap. 22, § 12; Chap. 11, § 22, Chap. 110, § 8; Wisconsin Statutes, 1911, §§ 2639, 2640.

DOUGLAS v. FORREST.

4 Bingham, 686. [*1828.*]

BEST, C. J. This was an action brought by the assignees of Stein & Co., bankrupts, against the executor of the will of John Hunter.

On the 31st of May, 1799, the testator acknowledged himself to be indebted to Stein & Co. in the sum of £447 6s 3d; and on the 11th of June in the same year, he acknowledged that he owed £75 to Robert Smith, one of the bankrupts, and one of the firm of Stein & Co. These debts were contracted in Scotland, of which country the deceased was a native, and in which he had a heritable property. Shortly after the year 1799 the deceased went to India. He died in India in 1817, having never revisited Scotland.

On the 25th of February, 1802, two decrees were pronounced in the Court of Sessions in Scotland against the deceased, one at the instance of Stein & Co., and the other at the instance of Robert Smith. In the first of these the deceased was ordered to pay to Stein & Co. £447 6s 3d, with interest, from the —— day of ———, besides expenses of process, etc. In the second decree the deceased was ordered to pay Robert Smith the sum of £75, with interest, from the —— day of ———, besides expenses of process, etc. It appeared from these decrees that the deceased was out of Scotland at the time the proceedings were instituted in these causes. He never had any notice of those proceedings. The decrees stated that the deceased had been (according to the law of Scotland) summoned at the market cross of Edinburgh, and at the pier and shore of Leith. A Scotch advocate proved that, by the law of Scotland, the Court of Session might pronounce judgment against a native Scotchman who had heritable property in that country for a debt contracted in Scotland, although the debtor had no notice of any of the proceedings, and was out of Scotland at the time. After such proclamations as were mentioned in these decrees had been made, the same witness proved that a person against whom such a decree was pronounced, might, at any time within forty years, dispute the merits of such decree; but that after the expiration of forty years, it was conclusive against him and all who claimed under him.

The questions to be decided are, first, whether an action can

be maintained in England on these judgments of the Court of Session in Scotland. Secondly, whether the replication is an answer to the pleas of the statute of limitations.

On the first question we agree with the defendant's counsel that if these decrees are repugnant to the principles of universal justice this court ought not to give effect to them; but we think that these decrees are perfectly consistent with the principles of justice. If we held that they were not consistent with the principles of justice, we should condemn the proceedings of some of our own courts.[1] If a debt be contracted within the city of London, and the creditor issues a summons against the debtor, to which a return is made, that the debtor hath nothing within the city by which he may be summoned, or, in plainer words, hath nothing by the seizure of which his appearance may be enforced, goods belonging to the debtor in the hands of a third person, or money due from a third person to the debtor, may be attached; and unless the debtor appears within a year and a day, and disputes his debt, he is forever deprived of his property or the debts due to him.

In such cases the defendant may be in the East Indies whilst the proceedings are going on against him in a court in London, and may not know that any such proceedings are instituted. Instead of the forty years given by the Scotch law, he has only one year given to him to appear and prevent a decision that finally transfers from him his property. Lord Chief Justice De Grey thought this custom of foreign attachment was an unreasonable one, but it has existed from the earliest times in London, and in other towns in England, and in many of our colonies from their first establishment. Lord Chief Justice De Grey and the Court of Common Pleas, after much consideration, decided against the validity of the attachment, according to the report in 3 Wilson, 297, because the party objecting to it had never been summoned or had notice. The report of the same case in 2 Blackstone, 834, shows that the court did not think a personal summons necessary, or any summons that could convey any information to the person summoned, but a summons with a return of *nihil;* that is, such a summons as I have mentioned, namely, one that shows that the debtor is not within the city, and has noth-

[1] For former chancery practice, see Daniel's Chancery Practice, p. 449.

ing there, by the seizing of which he may be compelled to appear. The 54 G. 3, ch. 137, not only recognizes the practice on which these decrees are founded, as being according to the law of Scotland, but enacts that on notices being given at the market cross at Edinburgh, and on the pier and shore of Leith, to debtors out of the kingdom, in default of their appearance the creditors may issue a sequestration against their effects. Can we say that a practice which the legislature of the United Kingdom has recognized and extended to other cases is contrary to the principles of justice?

INDIANA & ARKANSAS LUMBER CO. v. BRINKLEY.

164 Fed. Rep. 963 (C. C. A. 1908).

The defendant appealed from a decree holding void certain judgments of the state court enforcing special assessment liens.

SANBORN, Circuit Judge. The basic principle of the jurisprudence of the English-speaking nations is that no person shall be deprived of his life, liberty, or property without due process of law; that is to say, without notice and an opportunity to be heard before the decision respecting the justice of the disposition of his life, liberty, or property that is sought. Const. U. S. Amend. 14; Const. Ark., art. 2, § 21; 2 Kent's Comm. 13; Alexander v. Gordon, 101 Fed. 91, 96, 98, 41 C. C. A. 228. In the absence of legislative power to proceed otherwise, there is but one way to make a person a party to a suit or to direct to him an adequate notice of a proceeding to deprive him of his property or to bring his person within the jurisdiction of a court, and that is to direct the notice to him by his name and to serve it upon him in person. And where the authority is granted by a statute to notify him otherwise on certain conditions, those conditions must be fulfilled, the method prescribed must be substantially followed or the court fails to obtain jurisdiction of his person, and its decree against him is ineffectual and void. There was a provision of the statutes of Arkansas that, upon condition that it appeared in the complaint that the heirs of a deceased person or the owners of property to be disposed of in a suit were unknown, a warning order might be made by the clerk against such unknown heirs or owners. But there was no other

provision in the legislation of Arkansas whereby the heirs of a deceased person might be brought within the jurisdiction of one of its courts in a personal action without making them parties to the suit by name. The expression of one method of obtaining constructive service of such parties is the exclusion of all others, and this legislation was a denial of authority to obtain jurisdiction of unknown heirs or owners by constructive service in any other way than that there prescribed. The plaintiff in the suit to enforce the levee assessment either knew, or he did not know, who the heirs of R. C. Brinkley were. If he knew, there was but one way in which he could bring them within the jurisdiction of the court, and that was by making them defendants by their true names both in his complaint and in his warning order, and by directing the order to them by those names, for there was no authority granted by statute, by the common law, or by the practice of the courts to obtain jurisdiction of a defendant, whose name was known, in a personal suit in any other way. There was no statutory or other authority to obtain jurisdiction of such a defendant in a personal suit by publishing a notice to a class of which he might be a member without naming him. If, on the other hand, the plaintiff did not know the names of those heirs, there was only one way in which he could bring them within the jurisdiction of the court, and that was by averring that fact in his complaint and procuring a warning order directed to them as unknown heirs. He pursued neither course. He did not make the defendant, or the other heirs of R. C. Brinkley, deceased, defendants by their names, and the court acquired no jurisdiction of them if their names were known to him, and he did not allege in his complaint that their names were unknown to him, and the court acquired no jurisdiction of them if their names were not known to him. The inevitable conclusion is that where, in a suit *in personam* in chancery, the only authority to obtain jurisdiction of persons by publishing a warning order directed to heirs of a deceased person without naming them is conditioned by the appearance in the complaint of the averment that their names are unknown, the court acquires no jurisdiction of them by the issue and publication of such an order in the absence of the requisite averment.[1]

[1] See also Manning v. Heady, 64 Wis. 630.

KENNEDY v. THE NEW YORK LIFE INSURANCE CO.

101 New York, 487. [*1886.*]

Appeal from order of the General Term of the Supreme Court in the second judicial department, made February 12, 1884, which reversed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term. (Reported below, 32 Hun. 35.)

This action was brought to recover damages for an alleged breach of contract by defendant to sell and convey to plaintiff certain premises.

Defendant acquired title under a foreclosure sale; it was ready and willing to convey, but plaintiff declined to accept a conveyance, claiming defendant's title was defective, in that the summons in the foreclosure suit was served by publication, and that the affidavit upon which the order for such service was made was insufficient to give the court jurisdiction.

MILLER, J. The right of the plaintiff to recover in this action depends upon the construction to be placed on section 135 of the Code of Procedure.

In Carleton v. Carleton (85 N. Y. 313), upon which the respondent relies, the affidavit stated, "that defendant has not resided in the State of New York since March, 1877, and deponent is advised and believes is now a resident of San Francisco, California," and it was held that this was not sufficient under the Code of Procedure (section 135) to authorize the granting of the order; that it was merely an allegation of non-residence, and did not tend to establish that defendant could not, after due diligence, be found within the state.

It will be seen that in the case cited the affidavit as to residence is upon information and belief and does not show positively and distinctly that the defendant was a non-resident. Considerable stress is laid upon this fact, and in the opinion it is said: "Cases may arise where the proof of residence in a distant state at the very time, and of an absolute location there, would be so strong and conclusive as to render it entirely apparent that no act of diligence would be of any avail; and if the affidavit here had stated positively and distinctly that the defendant was at the time not only a resident of the state of California, but was then actually living in that state, there would be

ground for claiming that due diligence would be unavailing."

It would thus seem that where the proof of non-residence is clear and conclusive, and that the defendant is living out of the state and in a distant state, there may be strong reasons for holding that proof of due diligence is not required and a different result arrived at.

The case under consideration differs somewhat from Carleton v. Carleton *(supra)*. The affidavit here states that the defendants "cannot, after due diligence, be found within this state" (they being residents of other states as therein named), and "that the summons herein was duly issued for said defendants, but cannot be served personally upon them by reason of such non-residence." Here is a clear statement that the defendants are non-residents of the state and reside in other and distant states, and that the summons which has been issued cannot be served by reason thereof. This supplies the defect in the affidavit in the case cited in reference to the proof of non-residence and establishes beyond question the fact, making the case considered stronger in this respect than the one cited. The allegation as to non-residence is preceded by the statement that the defendants cannot, after due diligence, be found within this state, which, taken in connection with the subsequent averment as to non-residence, may be considered, we think, as a statement either that an attempt has been made to find the defendants, or at least that they are so remotely located out of the state and have such a fixed residence that it would be impossible after due diligence to find them within the state for the purpose of serving summons on them.[1]

[1] Potter, J., in McCracken v. Flanagan, 127 N. Y. 493. "It is, from an examination of this statute, and the decisions in relation to it, pretty evident that *some degree* of diligence must be exercised to find the party, and what is a due degree depends upon circumstances surrounding each case, and that the simple averments in the affidavit that the defendant is a non-resident and cannot be found within the state are not alone sufficient to support an order for the service of a summons by publication. Those facts do not imply that any diligence has been exercised to find and serve the defendant personally with process. It needs no argument to show that the averment in the affidavit that the defendant cannot be found in the state does not tend to prove the exercise of due diligence to find the defendant, for the statute in question not only requires that it be stated in the affidavit that the defendant cannot be found, but expressly requires the averment that

The statement as to due diligence is not absolutely an allegation of a conclusion of law, or an opinion, but, in connection with what follows, a statement of facts which tend to establish that due diligence has been used.

The two cases are clearly distinguishable, and we think the affidavit here contained allegations sufficient to call upon the judicial mind to determine whether due diligence had been employed to find the defendants, for the purpose of serving the summons issued. In granting the order, the judge so held, and as the language employed will bear this interpretation, the court should not, certainly in a collateral proceeding, determine that the affidavit was entirely defective and set aside the order.

The order of the General Term should be reversed and the judgment of Special Term affirmed.

McKENNA v. COOPER.

79 Kansas, 847. [*1909.*]

BURCH, J. In this case Cooper, the plaintiff, claiming title under a sheriff's deed, recovered in ejectment against McKenna, who claimed under a tax deed. The tax deed was invalid, and the material question is whether the sheriff's deed established title sufficient to authorize a recovery by the plaintiff.

The sheriff's deed was issued pursuant to foreclosure proceedings based upon service by publication, and it is claimed the affidavit and notice are defective in substance. It is not necessary to discuss their validity in this respect. The attack made on them is collateral, and they stand within the principles applied in the case of Sharp v. McColm, ante, p. 772.

It is further claimed that the notice is void because it does not have the form of process, which must run in the name of the state and bear the signature of the clerk and the seal of the court from which it issues.

"The style of all process shall be 'The State of Kansas,' and

he cannot be found after due diligence. Hence, the statute forbids that due diligence may be implied from the statement that the defendant cannot be found within the state."

all prosecutions shall be carried on in the name of the state." (Const. art. 3, § 17.)

"The style of all process shall be 'The State of Kansas.' It shall be under the seal of the court from whence the same shall issue, it shall be signed by the clerk, and dated the day it is issued." (Civ. Code, § 700.)

The word "process" has many meanings. In its broadest sense it comprehends all proceedings to the accomplishment of an end, including judicial proceedings. Frequently its signification is limited to the means of bringing a party into court. In the constitution process which at the common law would have run in the name of the king is intended. In the code process issued from a court is meant.

The legislature may authorize steps to be taken involving the use of process the equivalent of that which was known to the law of England and which formerly ran in the name of the king. If this be done such process must bear the style of the sovereignty—"The State of Kansas." But the legislature in its discretion may authorize steps to be taken involving the use of other means than process in the strict sense. Notices not issuing from the court itself, but given by some executive officer or interested person, may be employed, and in such case the form of process is not essential, although persons or property be subjected to the jurisdiction of a court. Notices in proceedings by executors, administrators and guardians to sell real estate are not process. The treasurer's notices relating to the sale and conveyance of land for taxes are not process, although the sovereignty of the state is intimately concerned. In some states the original summons to the defendant in an action is a mere notice by the plaintiff's attorney, and hence is not process in the sense of constitutional or statutory provisions prescribing the style and requisites of process.

"But we think a summons is not process within the meaning of section 14, article 6, of our state constitution. It is merely a notice given by the plaintiff's attorney to the defendant that proceedings have been instituted, and judgment will be taken against him if he fails to defend. This notice is not issued out of or under the seal of the court, or by the authority of the court, or any judicial officer. The fact that the court acquires jurisdiction by its service does not prove it process, for it is competent for the legislature to provide that the court shall acquire juris-

diction by the service of the complaint without a summons, or in any other manner by which the defendant may be notified that proceedings have been instituted against him. 'Process,' in a large acceptation, is nearly synonymous with proceedings, and means the entire proceedings in an action from the beginning to the end. In a stricter sense it is applied to the several judicial writs issued in an action. 7 Comyn's Dig. 120; 3 Black. Com. 279 et seq.; Bouvier's Law Dic. In this last sense it is manifestly used in the constitution, and when used in this sense we believe it only applies to judicial instruments issued by a court, or other competent jurisdiction and returnable to the same." (Hanna et al. v. Russell et al. 12 Minn. 80, 85.)

The meaning of the constitution of Illinois, which provides that all process shall run in the name of "The People of the State of Illinois," is thus explained:

"This object is manifest. It was to provide a name or title by which the sovereign power of the state should be designated. In England the king is supposed to be the fountain of justice and the source of power, and the sovereign power is there designated by his name and title. In Kentucky, and some of the other states, it is 'The Commonwealth;' in Missouri, and some others, it is 'The State.' Here it is 'The People,' etc. Where, by the law of England, whence we have mainly borrowed our system of jurisprudence, writs or process are issued, or other proceedings are had expressly in the name of the king, here they should run in the name of 'The People.' The latter is to be used instead of the former. The meaning is not that everything shall be done expressly in the name of 'The People,' but that nothing shall be done in any other name. Whenever the name of the sovereign power is invoked or expressed, that shall be its designation." (Curry v. Hinman, 11 Ill. 420, 423.)

(See, also, Leas & M'Vitty v. Merriman, 132 Fed. 510; Gilmer v. Bird, 15 Fla. 410; William Tweed v. Horace Metcalf, 4 Mich. 579; Case Manfg. Co. v. Perkins, 106 Mich. 349, 64 N. W. 201; Plano Manfg. Co. v. Kaufert, 86 Minn. 13, 89 N. W. 1124; Brooks v. Nickel Syndicate, 24 Nev. 311, 53 Pac. 597; Bailey v. Williams, 6 Ore. 71; Town of Davis v. Davis, 40 W. Va. 464, 21 S. E. 906; Porter v. Vandercook and others, 11 Wis. 70.)

Section 73 of the code provides that the party to an action may make service by publishing the necessary notice, and no form of notice is prescribed. Therefore the legislature has dis-

tinguished this notice from the process referred to in section 700 of the code, quoted above, and from the process spoken of in the constitution. (Nichols v. Burlington and Louisa County Plank Road Company, 4 G. Greene (Iowa), 42.)

The conclusion must be that the notice employed in obtaining service by publication is not process within the meaning of the constitution or statute, need not bear the style of "The State of Kansas,"[1] need not bear the seal of the court in which the action is pending, and need not be signed or issued by the clerk of such court.

The proceedings are sufficient to sustain the sheriff's deed, and the judgment of the district court is affirmed.

TURNER v. GREGORY.

151 Missouri, 101. [*1899.*]

GANTT, P. J. This is an action in ejectment for one hundred and twenty acres of land in the northern part of Bates county. Benjamin F. Metzler is the common source of title.

By warranty deed of April 18, 1878, Metzler and wife conveyed the land in suit to Singleton V. Turner and that conveyance was recorded April 20, 1878, in the recorder's office of Bates county. The land was swamp land and was never occupied by Turner. Metzler and wife resided in Johnson county, Missouri, and Singleton V. Turner resided in Maraposa county, California.

The plaintiff testified: "My name is Singleton Vaughn Turner. I live in California and was living there when I received the deed to the land in suit, from Metzler and wife. I am the person mentioned in said deed, the original of which I have mailed to my attorneys at Butler, Missouri. I formerly, prior to coming to California, lived in Holden, Johnson county, Missouri, some fifteen miles from the land in suit. While living in Holden I was usually called Vaughn Turner and the same is true in California where I reside. In signing papers I have usually signed my name S. V. Turner." On cross-examination, he says:

[1] Accord: Bank v. Hunt, 93 Ky. 67.

"Vaughn Turner has been the name by which I have always been called and known since my boyhood. It is the same by which I went in the neighborhood of the land. I answered to that name always."

The defendant read in evidence a sheriff's deed from the sheriff of Bates county reciting a judgment against these lands in favor of the collector for delinquent taxes thereon for the years 1885 and 1886, which judgment was rendered against Vaughn Turner and declared to be a lien on said lands, and decreed their sale to satisfy such judgment, interest and costs. It further recited a sale thereof June 17, 1889, and that Oscar Reeder was the highest and best bidder and purchaser thereof, and the conveyance to said Reeder. Defendant then read a deed from Reeder to himself of date June 27, 1889. Defendant also produced other witnesses who knew plaintiff during his residence in Missouri and testified he was known as Vaughn Turner.

It is at once apparent that one of the prime questions in this case is whether a suit against Vaughn Turner and an order of publication against Vaughn Turner and a judgment against Vaughn Turner is sufficient to divest the title of Singleton Vaughn Turner, whose title to the land depends upon a warranty deed to Singleton V. Turner, duly recorded prior to the assessment and levy of the taxes, which are the basis of the judgment, and prior to the commencement of the suit against Vaughn Turner. The validity of the tax deed depends upon the order of publication.

It is a fundamental rule of our law, founded in the plainest principles of natural justice that no man shall be deprived of his life, liberty or property without due process of law. Notice of the proceedings against him is essential to their validity. Accordingly whenever it is feasible our laws provide for actual, personal service on the defendant of the notice of the action, and in all proceedings the Christian and surname of both the plaintiff and the defendant should be set forth in the pleadings and process with accuracy. (Martin v. Barron, 37 Mo. loc. cit. 304 and 305.)

When a party is sued by a wrong name and actually served with process, if he does not appear and plead the misnomer in abatement the judgment will not be void. (Corrigan v. Schmidt, 126 Mo. loc. cit. 311.)

But a distinction exists between a case of personal service and a

case where the defendant is a non-resident, where the only notice is by publication. This at best is but constructive service of notice, and where resort is had to this method, a substantial, even rigid observance of the law is required, otherwise the judgment will be void. (Hutchinson v. Shelley, 133 Mo. 400; Winningham v. Trueblood, 149 Mo. 572; Young v. Downey, 145 Mo. 250.)

Hence in notifying a person by publication, as he can only be designated by his name, if his name be omitted, or a wrong name is attributed to him, it is at once evident that he receives no notice in fact [1] and has no opportunity of filing a plea in abatement. These general principles are settled law, but considerable difficulty has been experienced at times in their application. What shall be considered the name of a defendant is not always so plain.

One general rule has been to hold the first Christian name as essential and to hold that the middle name is no part of the man's name, or at least not necessary to his designation. Accordingly in Corrigan v. Schmidt, 126 Mo. 304, the order of publication was directed to Owen Corrigan, whereas the defendant's name was John Owen Corrigan, and it was held the process was void. On the other hand in Beckner v. McLinn, 107 Mo. 277, the defendant was named Mary Ann Byers, and in the order of publication she was described as Mary E. Byers. It was held

[1] Ellison, J., in Green v. Meyers, 98 Mo. App. 438, "In so concluding we are not unaware of those cases wherein the Supreme Court of this State and the United States and this court have decided that in the absence of matter of estoppel, an order of publication, or notice of sale by publication, against a person by the initial of his Christian name was not sufficient. Skelton v. Sackett, 91 Mo. 377; Turner v. Gregory, 151 Mo. 100; Marx v. Hanthorn, 148 U. S. 172; Mosely v. Riely, 126 Mo. 124; Burge v. Burge (not yet reported). But they are to be distinguished from cases of the kind now being considered. An order of publication is a mode of service as a requisite to jurisdiction. A person may know that an action is pending against him, and he may know that notice by an order of publication was intended for him, yet such knowledge will not supply the place of a proper order published with substantial correctness. In other words, knowledge, in such cases, will not supply notice. But in the matter of record of judgments and deeds, the reverse is true; knowledge will supply notice. If there be knowledge there need not be notice. So that if one has knowledge of a deed it is not necessary that he have the notice which the law attaches to its being recorded."

she was properly notified, as the middle name was no part of her name in law. (Phillips v. Evans, 64 Mo. 23; Smith v. Ross, 7 Mo. 463; State v. Martin, 10 Mo. 391; Franklin v. Talmadge, 5 Johns. 84.) A similar ruling has been made in many other states. (14 Ency. Plead. & Prac. p. 276, note 1.)

Again much controversy has arisen as to whether an order of publication which indicated the defendant merely by the initials of his Christian name was sufficient, and in Skelton v. Sackett, 91 Mo. 377, it was held that an order of publication to Q. R. Noland was not sufficient to give jurisdiction over Quinces R. Noland, in a tax case where the record title was in Quinces R. Noland.

On the other hand in Elting v. Gould, 96 Mo. 535, the order of publication to R. O. Elting was held sufficient where the record title was a patent to R. O. Elting.

In Nolan v. Taylor, 131 Mo. 224, in a proceeding to collect taxes, M. Jeff Thompson appeared from the record to be the owner of the land, and the judgment was rendered against Jeff M. Thompson, and it appeared that the warrants were located and the land entered in the name of M. Jeff Thompson. It was said: "This is the name he himself used and by which we must assume he was commonly known. He adopts and uses the given name of Jeff and enters the land in that name." It was held that the judgment was valid. These cases proceed upon a principle. They are the construction of our statute, section 7682, R. S. 1899, which requires all actions to enforce the state's lien against the delinquent owners of real estate to be brought "against the owner of the property."

In Vance v. Corrigan, 78 Mo. 94, and in State ex rel. v. Sack, 79 Mo. 661, it was held to be a compliance with this statute to make the owner of the land of record a defendant. This ruling was followed in Cowell v. Gray, 85 Mo. 169, and many times since.

When, therefore, the question of the sufficiency of the order in the Elting case was presented to the court, this court looked to the record and found that the record owner was R. O. Elting. Hence while it was true that while the owner of this land was named Richard O. Elting, he was entitled to have notice by that name, yet if of his own accord he saw fit to take the title to his land by the name of R. O. Elting and place it of record, this was an assertion that as owner of that land his name was R. O. Elting,

and when sued by that name for taxes on that land, he was estopped to say that his initials were not a sufficient designation of himself. We have then as to this class of cases a reasonable rule for the determination of this question of the name of the owner. Apply this rule to this case and we find that the record owner of this land was Singleton V. Turner. In his deed of record he is designated Singleton V. Turner no less than four times, and strange to say he signs his own name in full after that of his grantors, making in all five times his name appears on the record to which the collector was required to go to find the owner of this land before bringing suit. It is argued, however, that he was known by his middle name of Vaughn. There is no evidence that he ever signed his name that way, nor is he responsible for the fact that others so designated him. He has done nothing to estop himself from disputing the validity of these proceedings against him. Not having been sued by his real name, and that name appearing of record as owner of the land in suit in the county in which he was sued, the order of publication and judgment must be held void and subject to attack collaterally as well as directly. This conclusion is in harmony with all of our decisions.

In Mosely v. Reily, 126 Mo. 124, it will be observed the landowner had been sued by his correct initials and judgment obtained and the land sold. Subsequently by the same initials he conveyed the land to a third person who sued the purchaser at the tax sale. When Mosely, the purchaser from Clements, brought ejectment and came into court and claimed title under C. T. Clements, we think he was clearly estopped from denying the validity of a judgment against his grantor by the same name which the grantor used in conveying him the land. That case was decided correctly upon the principle of estoppel. (City Council v. King, 4 McCord, 487.)

II. As to the other contention that the sheriff's deed to Oscar Reeder was void because Reeder was the collector who brought the suit, we have ruled otherwise in Walcott v. Hand, 122 Mo. 621, to which we still adhere.

The judgment is reversed and cause remanded.[2] Sherwood and Burgess, J. J., concur.

[2] See also Flemming v. Krapl, 61 Ia. 417, holding judgment void where defendant's initials were reversed in the notice: Dautremont v. Iron Co., 104 Minn. 165, where the notice used the wrong middle initial.

FLADLAND v. DELAPLAINE.

19 Wisconsin, 459. [*1865.*]

By the Court, DOWNER, J. Davenport Rood conveyed the premises in dispute to John Liedburg, who executed a mortgage to Rood to secure the purchase money. Suit was brought to foreclose the mortgage in the circuit court for the county of Dane by Jesse Rhodes, the assignee of Rood, and he and Liedburg were the only defendants to the action. There was no personal service on Liedburg, nor did he appear in the action, and if there was any service on him at all, it was by the publication of an order for him to appear and plead. The record in this court shows neither the date of the order nor the time it was filed in the circuit court. The defendants in error, plaintiffs below, trace their title to the premises through the foreclosure decree and sale under it. It is insisted that the proceedings in that action are void, and we think they are as to the defendant Liedburg. The Revised Statutes of 1839, which the counsel for the defendants in error claim were in force at the time the order of publication was made, provide (sec. 45, p. 287) that "the court may by order direct such absent defendant to appear, plead, answer or demur to the complaint's bill of complaint at a certain day therein to be named, not less than three nor more than six months from the date of such order." The tenth subdivision of section one of "An act concerning the construction of statutes" (R. S. 1839, p. 35), provides that the word "month" shall be construed to mean a calendar month, unless otherwise expressed. According to these provisions the order should have required Liedburg to appear and answer the bill on a day certain, not less than three months from the date of the order. The order made fixes no day on which he should appear and answer, but requires him to do it in less than three months. In proceedings against absent or non-resident defendants, where there is no personal service, the courts have uniformly held that the directions of the statute must be strictly followed. In this case there is no pretense that the circuit court obtained jurisdiction as to Liedburg and his property in any other way than by virtue of the order and its publication. This order was not such as the statute authorized. If it would be valid when it required the defendant to answer within ninety days, instead of on a certain day beyond the period

of three calendar months, it would be valid if it required him to answer in thirty days or any shorter time. It is clear to us that the proceedings in the foreclosure suit are entirely void as to Liedburg.[1]

SECTION 2. SERVICE.

(a) *Common Law and Statutory Methods.*

ILLINOIS STATUTES, 1913.

[11. SERVICE OF SUMMONS—CONTINUANCE.] § 11. Service of summons shall be made by delivering a copy thereof to the defendant, or leaving such copy at his usual place of abode, with some person of the family, of the age of ten years or upwards, and informing such person of the contents thereof. If service is not had at least ten days before the return day of such summons, the cause shall stand continued till the next term of the court.[1]

[2. SERVICE—RETURN—FEES—BY COPY.] § 2. It shall be the duty of the sheriff or coroner to serve all process of summons or capias, when it shall be practicable, ten days before the return day thereof, and to make return of such process to the clerk who issued the same, by or on the return day, with an endorsement of his service, the time of serving it, and the amount of his fees: Provided, that when such process shall have been directed to a foreign county, the officer executing the same may make return thereof by mail; and the clerk may charge the postage and tax the amount in his fee bill. Service of summons, except when otherwise expressly provided by statute, shall be made by leaving a copy thereof with the defendant in person.[2]

[1] Accord: Brownfield v. Dyer, 70 Ky. 505. See, also, McDermaid v. Russel, 41 Ill. 489, reversing default where notice required appearance after the proper time; Calkins v. Miller, 55 Neb. 601, quashing order for same reasons; Jennings v. Johnson, 148 Fed. 337, where the order failed to designate the day for appearance.

[1] Chap. 22, Chancery Practice Act.

[2] Chap. 110, General Practice Act. Before the amendment of this statute the court had held that the service should be by reading instead of delivery of copy, Law v. Grommes, 158 Ill. 492.

[8. SERVICE ON CORPORATION—RETURN.] § 8. An incorporated company may be served with process by leaving a copy thereof with its president, if he can be found in the county, in which the suit is brought. If he shall not be found in the county, then by leaving a copy of the process with any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, station agent, or any agent of said company found in the county; and, in case the proper officer shall make return upon such process that he cannot in his county find any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, station agent, or any other agent of said company, then such company may be notified by publication and mail in like manner and with like effect as is provided in sections twelve (12) and thirteen (13) of an act entitled "An act to regulate the practice in courts of chancery."

MISSOURI R. S. 1909.

[1760. WRIT, HOW SERVED ON PERSONS AND FOREIGN CORPORATIONS.] § 1760. A summons shall be executed, except as otherwise provided by law, either: First, by reading the writ to the defendant and delivering to him a copy of the petition; or, second, by delivering to him a copy of the petition and writ; or, third, by leaving a copy of the petition and writ at his usual place of abode, with some person of his family over the age of fifteen years; or, fourth, where defendant is a corporation or joint stock company, organized under the laws of any other state or country, and having an office or doing business in this state, by delivering a copy of the writ and petition to any officer or agent of such corporation or company in charge of any office or place of business, or if it have no office or place of business, then to any officer, agent or employee in any county where such service may be obtained, and when had in conformity with this subdivision, shall be deemed personal service against such corporation, and authorize the rendition of a general judgment against it; or, fifth, where there are several defendants, by delivering to the defendant who shall be first summoned a copy of the petition and writ, and to such as shall be subsequently summoned, a copy of the writ, or by leaving such copy at the usual place of abode of the defendant, with some person of his family over the age of fifteen years; sixth,

where any action shall be commenced against any county, a copy of the original summons shall be left with the clerk of the county court fifteen days at least before the return day thereof. All copies of said writ shall be made by the officer serving same, and for each copy necessarily made by him he shall be entitled to a fee of ten cents.[1]

SMITH v. WINTLE.

Barnes Notes, 405. [*1734.*]

Defendant moved to set aside the proceedings, upon an affidavit that he was never served with process. A rule was made to show cause. Upon showing cause, plaintiff, who served the writ, made an affidavit that he put a copy through a crevice of the door of the Permit Office in Moorfield's, defendant having locked himself in, that he plainly saw him through the crevice, that he was very near the door, and that he acquainted him what the paper (put through the crevice) was, which the court held to be sufficient service and discharged the rule. Darnal for plaintiff; Birch for defendant.

GOGGS v. LORD HUNTINGTOWER.

1 Dowling & Lowndes, 599. [*1844.*]

Saunders moved for leave to enter an appearance for defendant. The affidavit in support of the application stated that in order to serve the defendant with a copy of the writ of summons, a person went three times to his residence, where he saw a female servant, who said, her master was not at home. On the third occasion she let down over the garden wall a basket into which the writ was put. The servant then took back the basket and shortly afterwards the voice of the defendant was heard in

[1] As amended by Laws of 1911, pp. 138-9.

the yard, saying to the servant, "Take it back, I will not have it." The party called on a subsequent day when the servant said she had given the writ to her master. There were several authorities to show that personal service was not necessary where it clearly appeared that the process had come to the hands of the defendant.

PARKE, B. In consequence of those cases, the judges have come to a determination that in future there shall be no equivalent for personal service.

ALDERSON, B. Service means serving the defendant with a copy of process and showing him the original, if he desires it.

Lord ABINGER, C. B. You may take a rule for distringas.

Rule refused.

SLAGHT v. ROBBINS.

13 New Jersey Law Rep. 340. [*1833.*]

HORNBLOWER, C. J. The plaintiff in certiorari seeks to reverse this judgment on two grounds. First, that the summons was not legally served; and, secondly, that the justice adjourned the cause in the absence of defendant, and then proceeded on the day to which he had adjourned the cause to give judgment against the defendant without giving him any notice of the adjournment. The validity of the second reason depends on the sufficiency of the first. If the defendant was legally summoned it was his own fault that he had not notice. He ought to have attended and he would then have known the time to which the cause was adjourned. The question then arises, was the summons legally served? The constable returned that he had "served the summons on the defendant by offering to read the same to him, but he would not stay to hear it." The act of assembly points out two modes of service: First, by reading it to the defendant if found and giving him a copy if required; and secondly, by leaving a copy at his residence, etc. The object of the summons is to give notice to the defendant, and when the constable finds or meets with him, and thus has an opportunity of making a personal service, it is his duty to do so, and it is better service so far as the defendant is concerned than service by leaving a

copy at his place of residence. In this case the defendant refused to remain and hear the summons read to him, he would not stay to hear it; and without furnishing the court with any reason or excuse for his doing so, he now seeks a reversal of the judgment because the summons was not read to him; thus attempting to take advantage of his own improper conduct. We are of opinion the service, was sufficient,[1] and his not knowing of the adjournment was his own folly. Let the judgment be affirmed.

It appears in this case the original certiorari was lost and a rule of this court was granted in May term, 1831, that a new certiorari should issue by way of substitute. By mistake an alias certiorari was issued, this was wrong; there is no such writ as an alias certiorari. Let the certiorari be amended and made comformable to the rule of court.

HEATH v. WHITE.

2 Dowling & Lowndes, 40. [*1844.*]

Peacock showed cause against a rule obtained by Ball, calling upon the plaintiff to show cause why the appearance entered for the defendant in this cause, the declaration and notice thereof served on the defendant, and all subsequent proceedings thereon should not be set aside, on the ground of irregularity. The circumstances of the case were these: The plaintiff had entered an appearance for the defendant and served him with notice of declaration, on affidavit of personal service of the writ of summons, by one Charles Thornton. The defendant had obtained the present rule on an affidavit made by himself, stating that no writ of summons purporting to be issued out of this court in this cause, nor any copy thereof, had been served upon him, nor had any copy of the said writ ever come to his possession or knowledge; and that the first intimation or notice which he had of any proceedings having been taken against him was the receipt of the notice of declaration. In answer to this was produced an

[1] And so in Borden v. Borden, 63 Wis. 374, where on refusal to receive a copy it was left in the door.

affidavit of C. Thornton, the party serving the writ of summons, to the following effect: That on going to defendant's place of residence he saw the defendant's man-servant, who, on inquiry, stated that his master was at home; that upon knocking at the front door of the defendant's house he was told by a female, who answered it, that the defendant was not at home; that afterwards the defendant's wife came to the door and said he had been gone out some time, but would be back in ten minutes; that deponent waited upon the premises for ten minutes and then again knocked at the front door of the house; that the defendant's wife then repeated that the defendant had gone out; that deponent, having turned round towards the window of the house, saw the defendant looking through it at him; that he thereupon immediately called out to him as loud as he could, stating that he had got a writ against him at the suit of the plaintiff, and held the copy for him to see, and threw it down and left it for him in his, the defendant's garden, before the said window, whilst the defendant was present thereat, the defendant's wife being at the time close to deponent's elbow, and deponent told her she had better pick it up and take it into the house, and give it to her husband as deponent had seen him, to which she replied, "I shall not touch it;" that deponent thereupon came away from the defendant's premises, leaving the copy of the writ where he had thrown it down; and that deponent had been previously informed in the neighborhood of the defendant's residence, that the defendant was a man that kept out of the way, and was rather difficult to be met with. It is submitted that a service effected under the circumstances detailed will be considered a sufficient personal service. In Thompson v. Pheney (1 Dowl, 443), Mr. Justice PATTESON says, "I do not mean to say that it is necessary to leave the process in the actual corporal possession of the defendant; for, whether the party touches him or puts it into his hand, is immaterial for the purpose of personal service. Personal service may be, where you see a person and bring the process to his notice. If the deponent had informed the defendant of the nature of the process, and thrown it down, that would do." In the present case the deponent sees the defendant at the window, explains to him the purpose of his visit, and throws a copy down in his sight. (WIGHTMAN, J. The window may have been closed and the defendant so far off that the defendant may never have heard a word he said.) If

this is not a personal service the defendant may always avoid being personally served. In 1 Chit. Arch., p. 115, 7th ed., it is laid down that "if after informing the defendant of the nature of the process, and tendering the copy, he refuses to receive it, then placing it on his person, or throwing it down in his presence, or leaving it at his house, would be sufficient service. Where a writ was put through the crevice of a door to the defendant, who had locked himself in, the service was deemed sufficient; and the same, where it was inclosed in a letter, which was proved to have been received by the defendant, and that he took out the copy." And he cites several authorities. (WIGHTMAN, J. I think it is safer to adhere to the general rule, that there should be actual personal service. If you cannot effect that you can then have a distringas.)

Saunders, *amicus curiae*, cited Goggs v. Lord Huntingtower, in which the Court of Exchequer held that for the future they would allow no equivalent for personal service.

Ball, in support of the rule, was not called upon.

WIGHTMAN, J. Every case must depend in a great measure on its own circumstances. I can conceive if the party is standing in the same room close to the defendant it may not be necessary that he should actually force a copy of the writ into the defendant's hands; laying it down before him would be sufficient. And, on the other hand, it would be absurd to hold it a personal service if defendant, being at a window at the top of his house, the party were to lay down the writ in the road at some distance off. I think that in the present case there has been no such personal service as is required, and the rule must, consequently, be absolute.

Rule absolute.[1]

MAHER v. KELLEY.

26 Illinois, 348. [*1861.*]

Appeal from an order refusing to set aside a judgment by default.[1]

[1] See, also, Van Ransellaer v. Petrie, 2 How. Prac. 94, where defendant left before the officer offered a copy.

[1] The statement has been condensed.

CATON, C. J. The service in this case was this: "Served the within writ on the within named Hugh Maher by informing him of the contents of the within writ, and he accepting service the 12th of October, 1860." This service was not sufficient. The statute requires the service to be by reading or by copy. If he had acknowledged service in writing upon the process, it might have estopped him to deny a sufficient service. But in this case there was neither the service required by the statute nor its full equivalent. The officer says he informed the defendant of the contents of the writ; but in this he may have misunderstood the substance of the writ. The defendant was not bound to take the understanding of the officer of the purport of the writ. If the particular mode of service required by the statute can in any case be dispensed with, it can only be where the court can see that the information conveyed to the defendant was quite as full and beneficial as if the service had been in strict conformity to the statute. The judgment below is reversed.

PALMER v. BELCHER.

21 Nebraska, 58. [*1887.*]

REESE, J. The original action was instituted before a justice of the peace in Valley county. Plaintiff in error appeared specially and objected to the jurisdiction of the court, alleging as the ground of such objection the defect in service of the summons. The objection was overruled by the justice, to which plaintiff in error excepted and removed the cause into the District Court by proceedings in error. In that court the judgment of the justice of the peace was affirmed. Plaintiff now alleges error and assigns therefor the ruling of the District Court in affirming the decision of the justice of the peace.

The return of the sheriff, to which objection is made, is as follows: "August 23, 1884. Received this writ, and on the 23d day of August, 1884, I served the same on the within named defendant, H. J. Palmer, by leaving a copy of the within summons with George Palmer, and by him the said George Palmer, in my presence at the time of said service delivered, the same being a true copy of the within summons with all endorsements

thereon certified by me to be a true copy to said H. J. Palmer," properly signed by the officer.

The objection to this service is that the sheriff delivered a copy of the summons to George Palmer instead of to plaintiff in error, and that George Palmer, who delivered it to plaintiff in error, not being an officer with authority to serve a summons, had no power to make the service by delivering it to plaintiff. In other words, the sheriff served the summons on the wrong person, and the fact that he gave it to the one intended to be served would not constitute a valid service.

We concede all that is claimed by plaintiff as to the duty of courts to see that proper service of summons is made before asserting jurisdiction and rendering judgment thereon; and that there must be a compliance with the requirements of the statute before jurisdiction can be obtained. If then the service does not come up to these requirements the decision of the District Court was wrong.

Section 911 of the civil code, prescribing the manner of service of summons, in so far as it applies to the case at bar, is as follows:

"The summons must * * * be served at least three days before the time of appearance, by delivering a copy of the summons with the endorsement thereon (certified by the constable or person serving the same to be a true copy) to the defendant, or leaving the same at his usual place of residence."

By an examination of the return of the sheriff, it appears that he served the summons on plaintiff in error by leaving a copy, properly certified, with George Palmer, and that George Palmer at that time, in the presence of the sheriff, delivered it to plaintiff in error. That is, by some mistake, perhaps, the sheriff gave the copy to George. George at once handed it to plaintiff in error. At any rate, the return clearly shows that the copy was delivered to plaintiff in error in the presence and by the act of the sheriff, although passing through the hand of another. It was clearly the act of the sheriff, and it would have been perfectly competent for him to have returned that he delivered the copy to plaintiff in error instead of stating the manner of delivery as he did. Had the sheriff requested George Palmer to return to him the summons, and he then have handed it to plaintiff, the service would have been perfect. Why any more so than for George to hand it at once to plaintiff? Suppose plaintiff had been so situated as to be just out of the direct reach of the sheriff, and another

person, standing between and in each of both, had taken the copy from the hand of the sheriff and handed it to plaintiff, as was possibly done in this case, why would the service not have been good? We can see no reason for holding it otherwise, even though the return had been made in the language of the one in the case at bar.

The decision of the District Court in holding the service to be a compliance with the statute is affirmed.

Judgment affirmed.[1]

The other judges concur.

SAVINGS BANK OF ST. PAUL v. AUTHIER.

52 Minnesota, 98. [*1892.*]

DICKINSON, J. This is an appeal from an order setting aside a judgment entered upon default against the above named respondent and another in the District Court.

The court was right in setting aside the judgment, for no jurisdiction over the defendant had been acquired by a service of the summons upon him. It was shown so as to leave no room for doubt that the service, upon proof of which the judgment was entered, was really made upon another person—one John E. Dailey. The latter, discovering the mistake, mailed to the defendant the copy of the summons served upon him, with a letter explaining the matter. The copy so sent by mail was received by the defendant before the entry of the judgment. Within a few days after the entry of the judgment the application was made to set it aside.

The facts as to the service being as above stated, it is perfectly useless to try to sustain the judgment, or to oppose the order setting it aside. The transmission of the summons by mail was wholly unauthorized by law as a mode of service,[1] and of no

[1] In Krotter v. Norton, 84 Neb. 137, a wife was held properly served by delivery of copy to her husband for her in her presence. In the absence of statutory authority the writ must be served by the proper officer, and service by an unauthorized person will not confer jurisdiction, Ry. v. Sayer, 13 Neb. 280; Schwaforth v. Reilly, 2 Dil. 127.

[1] And so where a notice was mailed to a non-resident instead of being published as required by the statute, Wilson v. Trenton, 53 N. J. L. 645.

more effect, although the defendant received it, than would have been his finding it in the street if it had been lost. The statute not only prescribes that service shall be made by delivering a copy thereof to the defendant personally (special provision being, however, made for a different mode of service at the house of his usual abode), but it in terms declares that the provision with reference to the service by mail of notices and other papers in action shall not apply to the service of a summons. 1878, G. S., ch. 66, §§ 59, 78.

The judgment being void for want of jurisdiction, the respondent was entitled to have it set aside, even though he made no showing of a meritorious defense. Heffner v. Gunz, 29 Minn. 108 (12 N. W. Rep. 342).

As the judgment might properly have been set aside without condition, the appellant has no reason to complain that conditions were imposed upon the respondent not prejudicial to the appellant. He cannot complain that the respondent was allowed to answer, interposing any defense which he might then have.

Order affirmed.

AMY v. WATERTOWN.

130 U. S. 301. [*1888.*]

This was an action in contract to recover on bonds issued by the municipality of Watertown, in Wisconsin. Judgment for the defendant. The plaintiff sued out this writ of error. The case is stated in the opinion.

Mr. Justice BRADLEY delivered the opinion of the court.

The principal question in this case is, whether the defendant, the city of Watertown, was served with process in the suit so as to give the court below jurisdiction over it. In order to understand the bearing of the facts of the case, it will be necessary to give a brief abstract of the laws of Wisconsin which relate to it, and these are mostly to be found in the charter of the city of Watertown and the acts supplementary thereto. The state laws are referred to because they govern the practice of the Federal Courts in the matter under consideration. By the fifth section of the act of June 1, 1872, Rev. Stat. § 914, it is declared that

"the practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such Circuit or Districts Courts are held." Were it not for this statute the Circuit Courts themselves could prescribe, by general rule, the mode of serving process on corporations as well as on other persons.

By the temporary Process Act of September 29, 1789, 1 Stat. 93, if not otherwise provided, the forms of writs and executions (except their style), and modes of process in the Circuit and District Courts, in suits at common law, were directed to be the same as in the Supreme Courts of the States respectively. By the permanent Process Act of May 8, 1792, 1 Stat. 275, it was enacted that the forms of writs, executions and other process, and the forms and modes of proceeding, in suits at common law, should be the same as directed by the act of 1789, subject to such alterations and additions as the said courts should deem expedient, or to such regulations as the Supreme Court of the United States should think proper by rule to prescribe to any Circuit or District Court. So that the practice in United States courts, in the old States, was made to conform to the state practice, as it was in 1789, subject to alteration by rule of court. In 1828 a law was passed adopting for the Federal Courts in the new States, admitted since 1789, the forms of process, and forms and modes of proceeding of the highest courts of those States respectively, as then existing, subject to alteration by the courts themselves or the Supreme Court of the United States. 4 Stat. 278. By the act of August 1, 1842, the provisions of the act of 1828 were extended to the States admitted in the intermediate time.

This review of the statutes shows that after 1792 it was always in the power of the courts, by general rules, to adapt their practice to the exigencies and conditions of the times.

But the statute of 1872 is peremptory, and whatever belongs to the three categories of practice, pleading and forms and modes of proceeding, must conform to the state law and the practice of the state courts, except where Congress itself has legislated upon a particular subject and prescribed a rule. Then, of course, the act of Congress is to be followed in preference to the laws

of the State. With regard to the mode of serving mesne process upon corporations and other persons, Congress has not laid down any rule; and hence the state law and practice must be followed. There can be no doubt, we think, that the mode of service of process is within the categories named in the act. It is part of the practice and mode of proceeding in a suit.

As the attempted service of the summons in 1873 can have no effect upon the solution of the present controversy, the question then arises whether the attempted service in December, 1882, was a sufficient and legal service. The court below held that it was not. We have already quoted the return of the marshal on that occasion. It appears from this return that he made the attempted service by delivering a copy of the summons to Wm. H. Rohr, the last mayor of the city, a copy to Henry Bieber, city clerk, a copy to Chas. H. Gardner, city attorney, and a copy to Thomas Baxter, the last presiding officer of the board of street commissioners of the city of Watertown, the office of mayor being vacant and there being no president of the common council nor presiding officer thereof in office. Was this such a service upon the city as the law requires? It clearly was not, unless by the law of Wisconsin, the circumstances of the case were such as to dispense with a literal compliance with the charter. The charter requires service on the mayor of the city. No such service was made. There was no mayor in office at the time. The last mayor had resigned, and his resignation had taken effect. Service on him was of no more avail than service on an entire stranger.

The question then is reduced to this, whether, in case the mayor has resigned, and there is no presiding officer of the board of street commissioners (a body which seems to take the place of the common council of the city for many purposes), service of process on the city clerk, and on a conspicuous member of the board, is sufficient. If the common law (which is common reason in matters of justice) were permitted to prevail there would be no difficulty. In the absence of any head officer the court could direct service to be made on such official persons as it might deem sufficient. But when a statute intervenes and displaces the common law we are brought to a question of words and are bound to take the words of the statute as law. The cases are numerous which decide that where a particular method of serving process is pointed out by statute, that method must be followed, and the rule is especially exacting in reference to corporations. Kibbe

v. Benson, 17 Wall. 624; Alexandria v. Fairfax, 95 U. S. 774; Settlemier v. Sullivan, 97 U. S. 444; Evans v. Dublin, etc., Ry., 14 M. & W. 142; Walton v. Universal Salvage Co., 16 M. & W. 438; Brydolf v. Wolf, Carpenter & Co., 32 Iowa, 509; Hoen v. Atlantic & Pacific Railway Co., 64 Missouri, 561; Lehigh Valley Ins. Co. v. Fuller, 81 Penn. St. 398. The courts of Wisconsin strictly adhere to this rule. Congar v. Railroad Co., 17 Wisconsin, 477, 485; City of Watertown v. Robinson, 59 Wisconsin, 513; City of Watertown v. Robinson, 69 Wisconsin, 230. The two last cited related to the charter now under consideration. In the first case service was made upon the city clerk and upon the chairman of the board of street commissioners whilst the board was in session, in the absence of the mayor, who could not be found after diligent search. The court, after referring to the provisions of the charter and the Revised Statutes on the subject, say: "The question whether the Revised Statutes control as to the manner of service is not a material inquiry here, because both the charter and general provision require the service to be made upon the mayor, but no service was made upon that officer as appears by the return of the sheriff. The principle is too elementary to need discussion, that a court can only acquire jurisdiction of a party, where there is no appearance, by the service of process in the manner prescribed by law." In the last case (decided in 1887) service was made in the same manner as in the previous one, and the court say: "When the statute prescribes a particular mode of service, that mode must be followed. *Ita lex scripta est.* There is no chance to speculate whether some other mode will not answer as well. This has been too often held by this court to require further citations. * * * When the statute designates a particular officer to whom the process may be delivered, and with whom it may be left, as service upon the corporation, no other officer or person can be substituted in his place. The designation of one particular officer upon whom service may be made excludes all others. The temporary inconvenience arising from a vacancy in the office of mayor affords no good reason for a substitution of some other officer in his place, upon whom service could be made, by unwarrantable construction not contemplated by the statute." It is unnecessary to look farther to see what the law of Wisconsin is on this subject. It is perfectly clear that by that law the service of process in the present case was ineffective and void.

There is a question entirely outside of the one which we have been discussing; it is, whether the state law, as thus ascertained, is objectionable on the score of being repugnant to the Constitution of the United States. Does it impose embarrassments in the way of the creditor in pursuit of his claim, which did not exist when his debt was created? The point is not distinctly made by the counsel of the plaintiffs in error, although it is hinted at in their brief. But no statute has been pointed out to us, showing any change in the law of the State in this regard. As the record stands, we have no sufficient ground for discussing the question in the present case.

With motives we have nothing to do. Certainly improper motives cannot be attributed to a state legislature in the passage of any laws for the government of the State. Individuals may be actuated by improper motives, and may take advantage of defects and imperfections of the law for the purpose of defeating justice. The mayor of Watertown may have been actuated by such a motive in resigning his office immediately after being inducted into it. But he had a legal right to resign; and if the plaintiffs are prejudiced by his action it is *damnum absque injuria*. The plaintiffs are in no worse case than were the creditors of the city of Memphis after the repeal of its charter and the establishment of a taxing district in its stead. The State has plenary power over its municipal corporations to change their organization, to modify their method of internal government, or to abolish them altogether. Contracts entered into with them by private parties cannot deprive the State of this paramount authority. See Meriwether v. Garrett, 102 U. S. 472.

The cases of Broughton v. Pensacola, 93 U. S. 266, and Mobile v. Watson, 116 U. S. 289, cannot aid the plaintiffs in this case. Those were cases in which a new name was given to an old corporation, or a new corporation was made out of an old one—that was the substance of it—and the question was whether the new corporation, or the old corporation by its new name, was liable for the old debts; and we held that it was. That was a question of liability, not a question of procedure. There the way was open for looking into the actual relations of the old and new corporations, and deciding according to the justice of the case. Here we are bound by statute; and not by the state statute alone, but by the act of Congress, which obliges us to follow the state statute and state practice. The Federal Courts are bound hand

and foot, and are compelled and obliged by the Federal legislature to obey the state law; and according to this law the judgment of the Circuit Court was correct and is, therefore,

Affirmed.

SETTLEMIER v. SULLIVAN.

97 U. S. 444. [*1878.*]

Plaintiff brought ejectment for certain lands in Oregon, claiming title through mesne conveyances from the patentee. The defendant claimed through an execution sale under a judgment by default in the state court. The sheriff's return showed service by delivering copy to the defendant's wife, a white person over fourteen years of age, at his usual place of abode. The trial court directed a verdict for plaintiff.[1]

Mr. Justice FIELD, after stating the case, delivered the opinion of the court.

If the certificate of the sheriff were the only document in the record referring to the service of the complaint and notice, there would be no doubt as to the correctness of the ruling of the court below. Service upon the wife of the defendant was not service upon him.[2] No theoretical unity of husband and wife can make service upon one equivalent to service upon the other. Personal citation to the defendant, or his voluntary appearance, is the essential preliminary to a purely personal judgment. The statute of the State in force at the time required service in cases other than those brought against corporations, or persons laboring under some disability, as minors, or as being of unsound mind, to be made by delivering a copy to the defendant personally; or, if he could not be found, to some white person of his family above the age of fourteen years, at his dwelling-house or usual place of abode. If it be admitted that substituted service of this kind upon some other member of the family is sufficient to give the court jurisdiction to render a personal judgment against its head, binding him to the payment of money or damages, it can

[1] The statement has been condensed.

[2] Semble. That at common law a wife was properly served by delivery of copy to husband. Barnes Notes, 406.

only be where the condition upon which such service is permissible is shown to exist. The inability of the officer to find the defendant was not a fact to be inferred, but a fact to be affirmatively stated in his return. The substituted service in actions purely *in personem* was a departure from the rule of the common law, and the authority for it, if it could be allowed at all, must have been strictly followed.

Such we find to be the ruling of the Supreme Court of Oregon. In Trullenger v. Todd (5 Ore. 39), judgment was entered by default for want of an answer by the clerk, in vacation, under the act of 1868, upon a certificate of the sheriff that he had served the summons upon the defendant "by delivering a copy thereof to a person of the family above the age of fourteen years, at the dwelling-house or place of abode of the defendant;" and the court held the certificate insufficient to authorize the entry of judgment in not containing the fact that the defendant could not be found. The statute, so far as the manner of service was concerned, was similar to that of 1861, a summons being substituted for the notice. "The statute," said the court, "in providing how service shall be made, evidently implies that when a summons is placed in the hands of an officer for service, that he will use ordinary diligence, at least, to find the party against whom the summons is issued, in order that he may make personal service upon him; but after using ordinary diligence, if he should fail to find such party, constructive service may be made; and when such service is made the certificate should contain the fact that the party could not be found." The court having thus held the judgment void, the only question left for its determination was whether it could entertain an appeal from it, as a void judgment could be disregarded and treated as a nullity whenever any right was claimed under it, whether set aside or not. It maintained the appeal solely for the purpose of reversing the judgment and thus purging its records.

Here it is contended that the recital in the entry of the default of the defendant in the case in the State court, "that, although duly served with process, he did not come, but made default," is evidence that due service on him was made, notwithstanding the return of the sheriff, and supplies its omission. But the answer is, that the recital must be read in connection with that part of the record which gives the official evidence prescribed by statute. This evidence must prevail over the recital, as the latter, in the

absence of an averment to the contrary, the record being complete, can only be considered as referring to the former.

We do not question the doctrine that a court of general jurisdiction acting within the scope of its authority—that is, within the boundaries which the law assigns to it with respect to subjects and persons—is presumed to act rightly and to have jurisdiction to render the judgment it pronounces, until the contrary appears. But this presumption can only arise with respect to jurisdictional facts, concerning which the record is silent. It cannot be indulged when the evidence respecting the facts is stated, or averments respecting them are made. If the record is silent with respect to any fact which must have been established before the court could have rightly acted, it will be presumed that such fact was properly brought to its knowledge. But if the record give the evidence or make an averment with respect to a jurisdictional fact, it will be taken to speak the truth, and the whole truth, in that regard; and no presumption will be allowed that other and different evidence was produced, or that the fact was otherwise than as averred. "If, for example," to give an illustration from the case of Galpin v. Page (18 Wall. 366), "it appears from the return of the officer or the proof of service contained in the record that the summons was served at a particular place, and there is no averment of any other service, it will not be presumed that service was also made at another and different place; or if it appear in like manner that the service was made upon a person other than the defendant, it will not be presumed, in the silence of the record, that it was made upon the defendant also."

We are of opinion that the principle here stated applies in this case. The record from the State court showed service upon the wife of the defendant in that case, and not upon the defendant; and in the absence of any finding of the court that other service was made, or the finding of a fact from which other service must necessarily be inferred, none will be presumed. Other service will not be presumed from its assumption in a recital in the entry of a default. It follows that the judgment of the court below must be affirmed; and it is

So ordered.[3]

[3] Accord: Lane v. Garbee, 105 Mo. 355; the result is not affected by the fact that the defendant received actual notice. Land Co. v. Lane, 106 Va. 304.

Mr. Justice BRADLEY, with whom concurred Mr. Chief Justice WAITE and Mr. Justice HARLAN, dissenting.

I dissent from the judgment in this case.

The entry of judgment recites that process was duly served. The return of the sheriff, though it does not state all the facts necessary to make the service good, yet does not contradict the recital; and no allegation was made that the defendant could have been found to be personally served with process. Under these circumstances I think the judgment cannot be assailed collaterally.

CRAIG v. GISBORNE.

79 Massachusetts, 270. [*1859.*]

Action of Tort. The officer made this return upon the writ: "Suffolk, ss., April 25, 1859. By virtue of this writ I have made diligent search for the within named Frederick N. Gisborne, but could neither find him nor any last and usual place of abode of his in my precinct, except on board of the steamer bound for Liverpool via Halifax, where he had taken passage, and was then hid away in some part of said steamer. I therefore attached a chip as the property of said Gisborne, and left him a summons in his berth on board of said steamer, for his appearance to answer as within directed."

In the Court of Common Pleas the plaintiff moved for a default. But BISHOP, J., ruled that the service was insufficient and that the court had no jurisdiction. To this ruling the plaintiff excepted.

HOAR, J. There was no service of the writ in any manner authorized by law. The officer returns that he found no last and usual place of abode of the defendant; and the defendant's berth in a steamer in which he had taken passage is clearly not such. There was no personal service, and the fact that he was hidden in the steamer is no reason for substituting for personal service the leaving of a copy where he might find it.

Exceptions overruled.[1]

[1] In People v. Judge, 38 Mich. 310, service was vacated where a copy had been left with an unconscious defendant.

PHOENIX INS. CO. v. WULF.

9 Bissell, 285 (U. S. C. C.). [*1880.*]

GRESHAM, J. The defendant, Bertha Wulf, owned certain real estate in Indianapolis, which she conveyed, her husband joining, to a third person, who conveyed it back to her husband, Henry Wulf. The husband, the wife joining, then mortgaged the same property to the Phoenix Mutual Life Insurance Company to secure a loan. The mortgage showed upon its face that it was to secure a loan to the husband. The loan was not paid at maturity, and afterward the mortgage was foreclosed in this court. Bertha Wulf subsequently brought suit in this court to set aside her deed to the third party, his deed to her husband, and the mortgage of herself and husband to the insurance company, on the sole ground that she was a minor when she executed those instruments. The service in the foreclosure suit was after Bertha Wulf had attained her majority, and the decree against her was by default.

The marshal's return shows that the subpoena in the foreclosure suit was properly served on Henry Wulf, in compliance with equity rule 13. As to the wife, the return reads thus: "I served Bertha Wulf by leaving a copy for her with her husband." Sometime after the wife commenced her suit, as already stated, the marshal appeared and asked leave to amend his return, so as to show that he had served the subpoena on her by leaving a copy for her with her husband, at her dwelling house or usual place of abode.

The defendant, Henry Wulf, occupied a building at the corner of Virginia avenue and Coburn street, in Indianapolis, both as a dwelling and a family grocery. In the lower story there were two rooms, the main one being occupied as a grocery and the back smaller one for storage purposes. These two rooms were separated by a hall which was entered by a door from Coburn street, and also from Virginia avenue through the grocery. A stairway led from the hall to the second story, where the family dwelt, eating and sleeping. The hall and stairway were accessible in both ways, and were, in fact, approached in both ways. The deputy marshal found the husband in the grocery and there served the subpoena on him, and then inquired for his wife, and was informed that it was early in the morning and she was

upstairs in bed where the family lived. The officer, then, in the grocery, handed to the husband a copy of the subpoena for his wife.

Upon these facts was there a valid service on the wife under the 13th equity rule, which declares that the service of all subpoenas shall be by delivery of a copy thereof, by the officer serving the same, to the defendant personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant with some adult person who is a member or resident in the family?

It is urged by counsel that the officer handed to the husband a copy of the subpoena when he was not at the "dwelling house or usual place of abode"—that the grocery room was as distinct from the residence in the upper story as if the two had been in separate buildings wide apart. That construction of the rule is narrow and unreasonable. It is conceded that if the officer had handed the copy to the husband in the hall the service would have been good, because the upper story was approached only through the hall, and it was therefore connected with the dwelling. There were but two ways of ingress to the residence or upper story—one from Virginia avenue, through the grocery, and the other through the door opening from Coburn street. The family passed in and out both ways, as best suited their convenience. A copy was left with one who understood its contents and was likely to deliver it to the person for whom it was intended.

The case of Kibbe v. Benson, 17 Wallace, 625, is cited against the sufficiency of the service. That was an action of ejectment in the Circuit Court of the United States for the Northern District of Illinois, which had adopted the statute of that state relating to actions of ejectment. After judgment was entered for the plaintiff by default, the defendant filed a bill in equity to set aside the judgment on the ground that he had no notice or knowledge of the pendency of the suit, and for fraud. The Illinois statute required that in actions of ejectment, when the premises were actually occupied, the declaration should be served by delivering a copy to the defendant named therein, who should be in the occupancy of the premises, or, if absent, by leaving the same with a white person of the family of the age of ten years or upwards "at the dwelling house of such defendant."

On the trial of the equity suit one Turner swore that when he called at Benson's house to serve upon him the declaration, he was

informed by Benson's father that Benson was not at home, and that while the father was standing near the southeast corner of the yard, adjoining the dwelling house and inside the yard, and not over 125 feet from the dwelling house, he handed him a copy of the declaration, explaining its nature, and requesting him to hand it to his son, after which the father threw the copy upon the ground muttering some angry words.

There was a conflict in the testimony, but the Circuit Court decided that even if the copy was handed to the father, as testified to by Turner, the service was not sufficient, and set aside the judgment which had been entered by default, and the decree was affirmed on appeal. In deciding the case the Supreme Court say, "it is not unreasonable to require that it (copy of the declaration) should be delivered on the steps or on a portico, or in some out house adjoining to or immediately connected with the family mansion, where, if dropped or left, it would be likely to reach its destination. A distance of 125 feet and in a corner of the yard is not a compliance with the requirements."[1]

Rule 13 should receive a liberal construction. It does not require the copy of the subpoena to be left with a person in the dwelling house; it is sufficient if the person who receives the copy is at the dwelling house. The rule is satisfied by a service outside the dwelling house at the door, just as well as inside the house.

I think Bertha Wulf was in court when the decree of foreclosure was entered. This is not a motion to correct the pleadings, judgment or process.

Courts have the power to permit officers to amend their returns to both mesne and final process, and the power is exercised liberally in the interest of justice, especially when the rights of third parties are not to be affected by the amendment.

In the exercise of a sound discretion they have allowed officers to amend their returns according to the real facts after the lapse of several years, and when there is no doubt about the facts such amendments have been allowed after the officer's term has expired.

[1] A hotel at which a non-resident was stopping for several weeks was not his usual place of abode within the meaning of the statute, White v. Prince, 36 Ill. 416. But a hotel or boarding house may continue to be the defendant's usual place of abode or residence during a considerable absence. Lee v. McFee, 45 Minn. 33.

I think justice requires that the amendment should be allowed in this case.

EARLE v. McVEIGH.

91 U. S. 503. [*1875.*]

Two suits were commenced by the respondents against the present complainant, and his son, who was not served, to enforce the payment of the several promissory notes described in the declarations in those suits; and the plaintiffs therein obtained service of process in the respective suits on the same day in the words following: "Executed the within summons February 24, 1862, on James H. McVeigh, by leaving a copy thereof posted at the front door of his usual place of abode; neither he nor his wife, nor any white person, who is a member of his family and above the age of sixteen years, being found at his said usual place of abode."

Declarations in due form were filed in the respective suits, and, the defendant not appearing in either, judgment was rendered against him in the first suit for the sum of $3,535.49, and in the second for the sum of $8,014.34, with interest in each case, as set forth in the record.

Proceedings were subsequently taken to sell certain lands to satisfy these judgments. The plaintiff filed a bill to enjoin, and the case was removed to the Circuit Court of the United States for the Eastern District of Virginia, where the temporary injunction was made perpetual.

Mr. Justice CLIFFORD delivered the opinion of the court. * * *

Notice to the defendant, actual or constructive, is an essential prerequisite of jurisdiction. Due process with personal service, as a general rule, is sufficient in all cases; and such it is believed is the law of the State where the judgments were recovered in this controversy, in all cases where such service is practicable. But the laws of that State also provide for service in three classes of cases in which personal service cannot be effected: (1) Residents who are temporarily absent from home. (2) Service may also be made upon persons not residents of the State. (3) Where the party resides in the State, in case it is not known in what particular county he has his residence.

1. Temporary absence from home will not defeat service, as in that case the statute provides that notice may be given to the party by delivering a copy of the process to the party in person; or, if he be not found at his usual place of abode, by delivering such copy and giving information of its purport to his wife, or any white person found there, who is a member of his family, and above the age of sixteen years; or, if neither he nor his wife nor any such white person be found there, by leaving such copy posted at the front door of his usual place of abode.

2. Persons not residing in the State may, in a proper case, be served by the publication of the notice once a week for four consecutive weeks in a newspaper printed in the State. Code 1860, p. 703.

3. Provision is made in respect to the third class, that on affidavit that a defendant is a non-resident of the State, or that diligence has been used to ascertain in what county or corporation he is, without effect, or that process directed to the officer of the county or corporation in which he resides or is has been twice delivered to such officer more than ten days before the return-day, and been returned without being executed, an order of publication may be entered against such defendant. Code, p. 707.

Doubtless constructive notice may be sufficient in certain cases; but it can only be admitted in cases coming fairly within the provisions of the statute authorizing courts to make orders for publication, and providing that the publication, when made, shall authorize the court to decide and decree. Hollingsworth v. Barbour, 4 Pet. 475; Regina v. Lightfoot, 26 Eng. L. & Eq. 177; Nations v. Johnson, 24 How. 205; Galpin v. Page, 18 Wall. 369.

When the law provides that notice may be posted on the "front-door of the party's usual place of abode," in the absence of the family, the intention evidently is that the person against whom the notice is directed should then be living or have his home in the said house. He may be temporarily absent at the time the notice is posted, but the house must be his usual place of abode, so that, when he returns home, the copy of the process posted on the front door will operate as notice, which is all that the law requires. By the expression, "the usual place of abode," the law does not mean the last place of abode, for a party may change his place of abode every month in the year. Instead of that, it is only on the door of his then present residence whe-

the notice may be posted, and constitute a compliance with the legal requirement.

Apply that rule to the case before the court, and it is clear that the notice was insufficient. Neither the complainant nor his family resided there; on the contrary, the case shows that his family left that city six weeks before the same was occupied by the Federal forces, and that they departed, leaving no white person in the house from which they departed, and that these facts were well known to the attorney of the respondents and to the officer who made the returns in question, which was made seven months after the complainant had left the county and was residing within the Confederate lines.

Tested by these considerations, it is clear that the house where the notice, if any, was posted, was not at that time the usual place of abode of the defendant in those suits; and it follows that the judgments founded on such defective notices are absolutely void.

Special reference is made to the act of the 10th of February, 1862, as having some bearing on the case, but the record shows that the present complainant had left his former residence seven months before the passage of that act and followed his family within the insurgent lines. He abandoned the business in which he was engaged and was known, as is admitted in the stipulation of the parties, throughout the whole period of the rebellion, as having sympathized with it and adhered to its fortunes.

Other defenses failing, it is suggested by the respondents that the complainant, when he departed from the city, left an agent resident there; but it is a sufficient answer to that suggestion to say that the agent referred to did not reside in the house where it is alleged the notices were posted, and that he had no authority whatever to accept or waive notice to the complainant in any such proceeding.

Concede that due service might have been made under the act providing for proceedings against non-residents; still it is clear that the concession cannot benefit the respondents, as they did not attempt to comply with the conditions contained in either section of that act. Sess. Acts, 1861, p. 58. .

Viewed in any light, it is plain that the case falls within the rule that the service of process by posting a copy on the door of a dwelling house is not a good service, if it appears by competent evidence that the house was not the usual place where the

defendant or his family resided at the time the notice was posted. Harris v. Hardeman, 14 How. 340; Buchanan v. Rucker, 9 East, 192; Boswell v. Otis, 9 How. 350; Oakley v. Aspinwall, 4 Comst. 513.

Even in proceedings *in rem*, notice is requisite in order that the sentence may have any validity. Every person, said MARSHALL, C. J., may make himself a party to such a proceeding, and appeal from the sentence, but notice of the controversy is necessary in order that one may become a party; and it is a principal of natural justice, of universal obligation, that, before the rights of an individual can be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. The Mary, 9 Cranch, 144.

No man shall be condemned in his person or property without notice, and an opportunity to be heard in his defense, is a maxim of universal application, and it affords the rule of decision in this case.

Decree affirmed.

(b) *Privilege and Exemption from Service.*[1]

COLE v. HAWKINS.

2 Strange, 1094. [*1729.*]

A copy of a bill of Middlesex was served on the defendant, whilst he was attending the sittings, in a cause wherein he was a defendant. And upon motion against the attorney for a contempt, it was contended to be right, because it was not an arrest, which restrained him of his liberty. But the court said that the privilege was designed as well to prevent any interruption of the business of the court, and it was equally a contempt. And they would have committed the attorney if he had not consented to waive the proceedings and pay costs.

[1] For the privilege of members of legislative bodies, see Rhodes v. Walsh, 23 L. R. A. 632, note; Berlet v. Weary, 60 L. R. A. 609.

WALPOLE v. ALEXANDER.

3 Douglas, 45. [*1782.*]

The defendant obtained a rule to show cause why he should not be discharged out of custody on filing common bail. The application was made on three grounds: 1. That he had come from France as a witness in a cause of Simond v. Hankey, to be tried at the sittings; 2. That he had been discharged by a commission of bankrupt subsequent to the debt for which he was arrested; and 3. That a suit was pending in France respecting the same subject matter.

The attorney-general and Cowper showed cause. As to the privilege of the defendant as a witness it appears that he arrived in London on the 20th of December, 1781. On the seventeenth of that month the cause in which he was to be a witness was put off, in consequence of a letter received from him, stating that he could not attend until after the next term. He swears in his affidavit that on coming to town he was served with a subpoena, by his own desire, which was on the 20th of December, the last day of the sittings. Whether the subpoena was for the sittings after the last or the next term, does not appear on the affidavit, but as no subpoena issued after the 12th of December, it must have been for the last term, when, by consent, the cause was postponed. He was arrested on the 28th of December, at which time there was no process by which he could be compelled to attend as a witness. The protection afforded to witnesses is not on their own account, but for purposes of justice; and when the defendant found that the cause could not come on at those sittings and that it was unsafe for him to remain, he might have returned. It is stated in the affidavit that an application was intended to be made for permission to examine him upon interrogatories, but that allegation is insufficient, for the consent of both parties is necessary to that proceeding, and it does not appear that it could have been obtained. (The court giving no opinion on the two latter grounds of the application, the arguments of counsel on those heads are omitted.)

Lord Mansfield (stopping Dunning, who was for the rule). This is the first case of a witness coming from abroad who has required the protection of the court. That protection is extended to witnesses coming from abroad, as well as to those who are

resident in this country. Although in England a party may have the benefit of the evidence of a witness who has been arrested, by means of a *habeas corpus ad testificandum*, yet, in order to encourage witnesses to come forward voluntarily, they are privileged from arrest. This privilege protects them in coming, in staying, and in returning, providing they act *bona fide*, and without delay, which is a question of reasonableness. Every reason which applies to the protection of a witness at home holds more strongly with regard to a witness who comes from abroad. The creditor is not injured by his coming; for unless he came, there would be no opportunity of arresting him. The service of the subpoena abroad would be an useless form; he cannot be punished for not coming; if he comes at all, then it must be voluntarily. The cause depending on the evidence of a witness who is out of the country, the time of trial must necessarily be uncertain. The only question then to be considered is whether, in such case, the witness comes *bona fide* or collusively.

There never was a fairer case than the present. The parties would not consent to examine the witness upon interrogatories, or to put off the trial; an application was therefore made to me, upon affidavits and letters from the witness. I proposed, and it was so settled, that at all events the cause should go on after this term, whether the witness came or not. In the meantime he arrived before the sittings were over; but I do not wonder that the parties did not apply to bring on the cause, for it was near Christmas. It is admitted that he was protected for some time—why not until the next sittings? Was he to go back again to Paris, merely to return here this term, putting the parties to an enormous expense? I am of opinion that all the rules which apply to the protection of witnesses here hold with regard to witnesses coming from abroad, and that the defendant must be discharged.

ASHURST and WILLES, Justices, of the same opinion.

BULLER, Justice. It is not true that the privilege of a witness depends upon the subpoena. I have found a case (E. 27, Car. 2) where a man was discharged who came to London to make an affidavit which might have been made in the country, but it was for the furtherance of justice, and he was therefore protected. No subpoena is necessary where the witness lives abroad.

Rule absolute.

The discharge, being on the privilege, was without the terms of filing common bail.[1]

MEEKINS v. SMITH.

1 H. Blackstone, 636. [*1791.*]

In this case one Davis was arrested by an officer of the sheriff of Middlesex, as he was returning from Westminster Hall, where he had been to justify himself as bail for the defendant, but was rejected. Upon this a rule was granted to show cause why he should not be discharged out of custody, on the ground that he was entitled to privilege from arrest, both in going to and returning from the court, his attendance being in the course of the cause and the administration of justice. Adair and Clayton, sergeants, showed cause, contending that as bail were not compelled to attend by process (as witnesses were), but came voluntarily into court, they had no claim to such a privilege. It was holden in the case of King v. Fielding, Comb. 29, that a person coming to court to swear the peace was liable to be arrested, and in an anonymous case, Salk. 544, a person who came to confess an indictment had no privilege *eundo et redeundo,* because there was no process against him. Although it is stated in Impey's Pract. C. B. 125, that bail are privileged, the case there cited from Barnes was this: "The defendant being arrested in returning from attendance on the court to justify his bail was ordered to be discharged." Johannet v. Lloyd, Barnes, 27. Besides, it was highly improper that any man should become a security for the debts of another, while his own were unpaid.

The court seemed much inclined to think that not only the witnesses, but all persons who were coming to or returning from it, either directly on the business of the court, or in any manner relative to that business, were entitled to a freedom from arrest, and that to arrest them was a contempt of the court. Several

[1] Under similar circumstances a witness was discharged from arrest in Wood v. Neal, 5 Gray, 535, and May v. Shumway, 16 Gray, 86.

cases were also mentioned of barristers, who were arrested on the circuit, being discharged by the judge.

GOULD, J., recollected the instance of a Mr. Hippisley, a barrister[1] who was discharged from an arrest on the circuit by Mr. Justice Birch at Salisbury. And

HEATH, J., mentioned a similar thing having been done by the late Mr. Baron Burland.

At length it was agreed that the rule should be enlarged till this day, when Davis was brought up by *habeas corpus*, which issued in the meantime, and offered again to justify as bail, but was again rejected, it appearing that he was an uncertified bankrupt, and in desperate circumstances. The court, therefore, ordered him to be remanded, and at the same time laid down this general rule, viz., that all persons who had relation to a suit which called for their attendance, whether they were compelled to attend by process or not (in which number bail were included), were entitled to privilege from arrest *eundo et redeundo*, provided they came *bona fide*. But here there was a manifest intention on the part of Davis to impose upon the court, and on that account he was not to be permitted to avail himself of the exemption.

Rule discharged.[2]

GOULD, J., referred to the year book 11 Ed. 4, 3, where it is said by Choke that a mainpernor shall have the privilege of the court.

PERSON v. GRIER.

66 New York, 124. [*1876.*]

Appeal from order of the General Term of the Supreme Court in the third judicial department, affirming an order of Special

[1] See Hoffman v. Circuit Judge, 113 Mich. 109; Greenleaf v. Bank, 133 N. C. 292.

[2] The sheriff was held not liable for a failure to arrest a bankrupt voluntarily attending a sitting of the Commissioners. Arding v. Flower, 8 Term Rep. 534 (1800).

The arrest of a party attending a trial is not an actionable trespass, but a ground for discharge, Cameron v. Lightfoot, 2 W. Blackstone, 1190.

Term, setting aside a service of the summons upon defendant Grier. (Reported below, 6 Hun. 477.)

Said defendant was the only one served. He is a resident of Pennsylvania, and was served while in attendance at a circuit in Chemung county as a witness in an action in the Supreme Court wherein the plaintiff herein was a defendant.

J. McGuire for the appellant. Defendants were not exempted by any statute from the service of civil process unaccompanied by an arrest while attending court as a witness, or in going to or returning from such court. (Pollard's Case, 7 Abb. (N. S.) 71).

ALLEN, J. It is the policy of the law to protect suitors and witnesses from arrests upon civil process while coming to and attending the court and while returning home. Upon principle as well as upon authority their immunity from the service of process for the commencement of civil actions against them is absolute *eundo, morando et redeundo.* This rule is especially applicable in all its force to suitors and witnesses from foreign states, attending upon the courts of this state. In some instances witnesses and suitors, residents of the state, have only been discharged from arrest upon filing common bail; but the service of process upon non-resident witnesses and suitors has been absolutely set aside, thus giving color to a distinction between the two classes in respect to their immunity. Whether any distinction should or does in fact exist, is at least doubtful. This immunity is one of the necessities of the administration of justice, and courts would often be embarrassed if suitors or witnesses, while attending court, could be molested with process. Witnesses might be deterred, and parties prevented from attending, and delays might ensue or injustice be done. In Norris v. Beach (2 J. R. 294) the defendant, a resident of the State of Connecticut, attending in this state to prove a will, was held exempt from the service of a capias and discharged absolutely from the arrest. The like relief was granted in Sanford v. Chase (3 Cow. 381), and the defendant, a resident of Massachusetts, arrested upon civil process while attending as a witness before arbitrators, was discharged absolutely without filing common bail, the court saying: "The privilege of a witness should be absolute." The court in Hopkins v. Coburn (1 Wend. 292) expressly affirm the absolute immunity of foreign witnesses attending our courts from the service of civil process for the commencement of an

action. The same rule was held in Seaver v. Robinson (3 Duer. 622), and Merrill v. George (23 How. 331), and the service of a summons upon persons attending from other states as witnesses in this state was in each case set aside. This court, in Van Lieuw v. Johnson (decided in March, 1871, but not reported), substantially adjudged that a summons could not be served upon a defendant, a non-resident of the state, while attending a court in this state, as a party. Four of the judges taking part in that decision were of the opinion that neither a party nor a witness attending a court in this state from a foreign state could be served with summons for the commencement of an action. The order denying an application to set aside the summons in that case was affirmed upon the ground that the party had lost his privilege by remaining within the state an unreasonable and unnecessary time after the close of the trial upon which he had attended. CHURCH, Ch. J., and FOLGER, J., dissented from this result, being of the opinion that the privilege had not been lost. The authorities, as well as the principle upon which the privilege rests, clearly lead to an affirmance of the order. The defendant Grier attended in this state, in good faith, as a witness, and the summons was served upon him while he was so attending and during the continuance of the freedom from arrest. The courts will not take jurisdiction of a party whose rights are thus invaded. It would be, in effect, and for all practical purposes, a withdrawal of the shield and protection which the law uniformly gives to witnesses, if a party coming from a foreign state could be served with process and an action commenced against him, the judgment in which would conclude him in all jurisdictions and could be enforced by action everywhere.

The order must be affirmed.[1]

[1] Same rule was applied to a non-resident party attending the taking of depositions in a case pending in a Federal Court in another state, Parker v. Marco, 136 N. Y. 585; but see Grier v. Young, 120 Ill. 184, denying the privilege where a non-resident party was attending the taking of depositions in a case pending in the court of another state. See also Christians v. Williams, 111 Mo. 429, in which the privilege was denied a resident party attending court in another county, but apparently recognizing a different rule in case of a non-resident.

BISHOP v. VOSE.

27 Connecticut, 1. [*1858.*]

This was an action of assumpsit, brought by the plaintiffs, partners under the name of Bishop & Co., against Francis Vose and Charles L. Perkins of the city and state of New York, and John B. Kettell, of Boston, in the state of Massachusetts, late partners under the name of Vose, Perkins & Co. The writ was served as a summons on Vose, in the city of Bridgeport in this state on the 24th day of January, 1857, and no other service was made in the case.

At the first term of the court Vose filed a written motion that the cause be stricken from the docket, on the ground that all the defendants were inhabitants and residents of other states, and that no service of the writ was made except upon him personally in the manner stated, and that at the time of such service he was necessarily attending court at said Bridgeport as a party and witness in a case there on trial. The court on the motion found that Vose came into the state to attend the trial of a suit then pending in the Superior Court for the county of Fairfield, at the December term, 1856, in which he and the other defendants in the present case were plaintiffs, and the present plaintiffs were defendants; that he attended as such plaintiff, and to testify as a witness therein; that he remained in attendance in court after the testimony was closed on the afternoon of the 23d day of January, 1857, and during the argument which then commenced and was concluded by the plaintiff's counsel on the afternoon of the 24th day of said January, and until after the cause was committed to the jury by the judge; and was intending to leave, and did in fact leave in the first practicable conveyance thereafter, viz.: in the train which left Bridgeport for New York on the evening of the 24th of January, 1857; and that the process in this suit was served upon him on the 24th day of January, after the termination of the trial. The suit was brought upon a contract executed in the state of New York.

The questions of law arising upon the motion and on the facts found thereon were reserved for the advice of this court.

ELLSWORTH, J. * * * Another question is made of a different and novel character, but which is easily disposed of. Was Mr. Vose privileged from being served with a summons because

he came here to attend the trial of a case which he caused to be brought in one of our courts? We think he was not. Had he been an inhabitant of Connecticut, his attendance in court would have given him no such immunity. Why should it any more because he comes here from another state? This would seem to be an additional reason why our citizens should be allowed to sue him here and bring him to trial within our own jurisdiction. At any rate he can not be placed on any better ground than our own citizens. In King v. Coit, 4 Day, 130, our court decided that while the defendant was attending the General Assembly he was not subject to a suit by any form of service whatever, not even to a writ of error, which is nothing but a summons, but the decision was placed on the peculiar language of the statute, which declares that a member of the assembly shall not be arrested, sued or imprisoned or anywise molested or troubled, or compelled to answer to any suit, bill, plaint, declaration or otherwise, before any other court, judge, or justice, cases of high treason and felony excepted; and even in this case Judge Reeve, in a dissenting opinion, held that this statute ought not to be so construed as to render void and inoperative the service of a writ by leaving a copy or by a mere summons. He held that the statute introduced no new rule of law; for it was conceded on all hands that at common law, although an arrest would be void and the person set at large on motion, the suit would not abate, and that was all that was intended by the statute. And we suppose there can be no doubt that in all such cases of parties or witnesses, they can not be arrested or detained, and will be discharged at once on motion to the court, because the court needs their attendance and assistance to enable it to discharge its duties to the parties and the public; but a mere summons works no prejudice to the court or the parties, and the action goes into court to take its trial at some proper and convenient time. Generally, if not universally, at the common law, parties and witnesses are liable to be sued, though their bodies can not be attached or detained, and hence all the books speak of their being entitled to their liberty, but nothing more, and the suit never abates for any such cause. 1 Phill. on Ev. 5, 6; 1 Sw. Dig. 497; King v. Coit, *supra*. Numerous other cases are cited in 1 U. S. Dig., p. 236 *et seq.*

It is said again to be unjust and to involve a want of comity to foreigners when they come here of necessity to sue our citi-

zens, who can not be found elsewhere and have no property elsewhere, to allow them to be sued and compelled to submit their causes to our courts of justice. But why is this unjust or uncourteous? We confess we do not see it. From the first it has been the law, both common law and statute law, that a foreign citizen, if found here, whether here on business or pleasure or hastening through the state with railroad speed, is liable to be sued like any other person and is not entitled to any personal or peculiar immunity. And we are at a loss to discover why our citizens should be obliged to go into a foreign jurisdiction in pursuit of their debtors, when those debtors are here and can be sued here and can receive here that consideration which is meted out to all indiscriminately. The very difficulties which are urged here by the defendant may, for aught we know, be urged in greater force in any other state or country.

It is said that at all events, however the law may be as to a party, a witness from abroad stands on a different ground, and that he certainly ought not to be liable to be sued here while in attendance on our courts as a witness. Perhaps this is so. We are not prepared to say that it is not, since a witness may be said not voluntarily to put himself under our jurisdiction like a party. Distinguished judges have thought there was a difference and a material difference in this respect, that foreign witnesses ought to be encouraged to come and testify in person, and therefore should be protected from all jurisdictional process of a civil nature, while this is not necessary as to parties, who are not here except from pure choice, whether they be plaintiff's or defendants. We believe that such is the law of New York and perhaps is held elsewhere. Norris v. Beach, 2 Johns. 294; Bours v. Tuckerman, 7 id. 538; Sanford v. Chase, 3 Cow. 381; Seaver v. Robinson, 3 Duer, 622; 1 Greenl. Ev., sec. 316; Lightfoot v. Cameron, 2 W. Bla. 1113.

However this may be, we know of no decisions that carry the exception beyond the case of a witness, and there is no principle of comity or public policy to be derived from them which will sustain the doctrine claimed by the defendants. We advise judgment for the plaintiffs.

In this opinion the other judges concurred.[1]

[1] Semble, accord, Baisley v. Baisley, 113 Mo. 544; Grier v. Young, 120 Ill. 184; Mullen v. Sanborn, 25 L. R. A. 721, note. Contra,

HARE v. HYDE.

16 Queen's Bench (N. S.), 394. [*1851.*]

Pashley, in the present term, obtained a rule *nisi* to discharge the defendant in this cause from custody. It appeared that the defendant was indicted and tried for embezzlement at the West Riding Quarter Sessions. He was acquitted and ordered to be discharged. Immediately afterwards he was arrested on a ca. sa. at the suit of the plaintiff in this cause. It did not distinctly appear on the affidavits whether he had actually left the dock or not; but it was clear that he had been discharged by the Quarter Sessions and arrested in court immediately afterwards, and whilst the Quarter Sessions were still sitting.

Lord CAMPBELL, C. J. I am of opinion that the defendant had no privilege in respect of his having been tried and acquitted and ordered to be discharged. He was after that in the same position as any other of the circumstantes in court. The cases show that an acquitted prisoner has no privilege *redeundo;* and it follows that, whilst remaining as a spectator, he has no privilege more than any one else.

The question then comes to be, whether any person arrested on civil process in a court of justice is entitled to be discharged. I do not think he is. It is not a proper course to execute an arrest in such a place; and I do not say that the court in some cases may not discharge the person so arrested, but no such case is made here. We are not asked to vindicate the dignity of the Court of Quarter Sessions, but applied to by the defendant, who is in custody.

PATTESON, J. This is the defendant's rule. He has no privilege, and has been arrested, so far as he is concerned, rightly; though it may be that the arrest was a contempt of the Court of Quarter Sessions.

COLERIDGE, J., and WIGHTMAN, J., concurred.

Rule discharged.[1]

Mathews v. Tufts, 87 N. Y. 568. In Chittenden v. Carter, 82 Conn. 585, the privilege was sustained in case of a non-resident witness, distinguishing Bishop v. Vose.

[1] Same result in Scott v. Curtis, 27 Vt. 762, where process was served while the defendant was in custody on a criminal charge. But this rule will not protect an abuse of criminal process. See Hurlburt v. Palmer, 39 Neb. 158 (defendant taken

MOLETOR v. SINNEN.

76 Wisconsin, 308. [*1890.*]

Appeal from the Circuit Court for Sheboygan County. Action for a breach of promise to marry. The plaintiff appeals from an order setting aside the service of the summons and complaint, and vacating an order of arrest. The facts will sufficiently appear from the opinion.

COLE, C. J. Did the Circuit Court properly set aside the service of the summons and complaint in this action and vacate the order of arrest therein? The defendant was brought into this state upon a requisition upon the governor of Illinois, having been charged with the crime of seducing the plaintiff under a promise of marriage, and alleging that he was a fugitive from justice. Upon an examination before a magistrate he was bound over for trial. At the April term of the Circuit Court of Sheboygan county, 1889, an information was filed in that court charging the defendant with having committed the crime of seduction. At the October term of that court the defendant was duly arraigned, and a plea in abatement was interposed, setting up the statute of limitations as a defense to the action. This plea was sustained by the court and the defendant was discharged from custody. Within ten minutes after his discharge and before he had departed from the courtroom the deputy sheriff made service of summons and complaint and order of arrest upon him, at the suit of the plaintiff for a breach of promise.

It appears that the defendant, at the time of the alleged seduction, was a resident of Sheboygan county. He left the state in January, 1888, and remained outside the state, except that he returned in the night-time in the same month and transacted some business, and immediately left. He was brought back on a requisition as a defendant in a criminal action, and as a fugitive from justice. It is said by the counsel for appellant that the affidavit of the defendant upon which the order of the court

into another county in order that he might be served); Byle v. Jones, 79 Mo. 261 (defendant arrested and brought into county on fictitious criminal charge); McNab v. Bennett, 66 Ill. 157 (same); Willard v. Zehr, 215 Ill. 148 (fraudulent extradition).

setting aside the service and order of arrest is based is insufficient, because it fails to show any fraud or abuse of the process of the court by the appellant, or by any person acting for her, in the procurement of the return of the defendant on the criminal prosecution, nor does it show that the defendant was, at the time he so returned on the requisition, a *bona fide* citizen of Illinois. But it appears from the affidavit of the plaintiff which was used to obtain the order of arrest that the defendant was not a resident of this state, but resided in the city of Chicago, and that he was about to return to that state; and, while the promise of marriage was made and the alleged seduction was accomplished, in 1887, it does not appear that the plaintiff had anything to do in procuring the defendant's return on the requisition of the governor, nor does it appear that there was any fraud used on the part of any one to get the defendant within the state. In that respect the case is distinguishable from Townsend v. Smith, 47 Wis. 623, and cases where jurisdiction is obtained by fraudulent means.

It is assumed, in this case, as a fact, that the defendant had committed the crime of seduction, as alleged, and had withdrawn himself from the state to avoid a prosecution therefor, so as to be a fugitive from justice in a legal sense. Still, having been forcibly brought to the state on a requisition, and the court having exhausted its jurisdiction over him in respect to the crime with which he was charged, could he properly be arrested in a civil action until a reasonable time and opportunity had been given him, after his discharge, to return to the state from which he had been forcibly taken? This is the question involved in the appeal; and we think sound principle requires that, where a person has been brought within the jurisdiction of a court upon a requisition as a fugitive from justice, and has been tried for, or discharged as to, the offense charged against him, he ought not to be subject to arrest on a civil process until a reasonable time and opportunity has been given him to return to the state from which he was taken. In the courts of the United States the weight of judicial opinion is in favor of the proposition that, where a party in good faith is brought within the jurisdiction of a state, or detained therein, being a nonresident, either as a party to a suit or as a witness in another suit, he is not subject to service. Small v. Montgomery, 23 Fed. Rep. 707; Junea Bank v. McSpedan, 5 Biss. 64; U. S. v. Bridgman, 9 Biss. 221; Blair

v. Turtle, 1 McCrary, 372, 5 Fed. Rep. 394; Atchinson v. Morris, 11 Fed. Rep. 582. Many of the state courts hold the same rule. Compton v. Wilder, 40 Ohio St. 130; People ex rel. Watson v. Judge, 40 Mich. 730; Cannon's Case, 47 Mich. 482; Baldwin v. Branch Circuit Judge, 48 Mich. 525; Jacobson v. Hosmer, 76 Mich. 234; Sherman v. Gundlach, 37 Minn. 118; Chubbuck v. Cleveland, 37 Minn. 466; Palmer v. Rowan, 21 Neb. 452; Wanzer v. Bright, 52 Ill. 35; Williams v. Reed, 29 N. J. Law, 385; Hill v. Goodrich, 32 Conn. 588. The last three cases go upon the same ground as Townsend v. Smith, 47 Wis. 623.

The reason for the rule that a person is exempt from arrest under the circumstances disclosed in this case is that sound public policy requires that a person shall be privileged from arrest while going to or from court in all judicial proceedings. The privilege should exist to subserve great public interests and the due administration of justice. Moreover, as was said by CAMPBELL, J., in Cannon's Case, 47 Mich. 482, "it is very well known that the perversion of extradition proceedings has on more than one occasion led to difficulties between nations, and to refusals by state executives to deliver up persons charged with crime whose arrest was supposed to be desired for sinister purposes." The temptation is certainly strong to make such requisitions subservient to private interests; and they are often resorted to to enforce a collection of private debts, or to remove a citizen from his home into a foreign jurisdiction in order to get service on him in a civil action. For the most cogent reasons, therefore, we think courts of justice are bound to see that no improper use be made of such proceedings, which would look like a violation of good faith and a perversion of measures which had to be resorted to in order to bring the party accused within their jurisdiction.

We do not deem it necessary to comment in detail upon all the cases cited. We will observe, however, that in cases of extradition by a foreign government under a treaty, the Supreme Court of the United States holds that a person who has been brought within the jurisdiction of a court by virtue of proceedings under an extradition treaty could only be tried for one of the offenses described in said treaty and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity had been given him, after his release or trial upon such charge, to return to the country from whose

asylum he had been forcibly taken under those proceedings. U. S. v. Rauscher, 119 U. S. 407.

A distinction is made in some of the authorities between civil and criminal cases. In criminal cases some courts hold that even a forcible seizure in another country, and the transfer by violence or fraud to this country is no sufficient reason why the party should not answer when brought within the jurisdiction of a court which has the right to try him for such an offense. See Ker v. Illinois, 119 U. S. 436; Mahon v. Justice, 127 U. S. 700. The offense having been committed in the state to which the party is brought, he may be there tried for it; and neither comity to a sister state, nor any just appreciation of the rights of a citizen entitle him to be released. He may be held to answer for the crime he has committed. This question is fully considered in State ex rel. Brown v. Stewart, 60 Wis. 587. But it is obvious there is no fair analogy between civil and criminal cases in this respect, and a different rule applies.[1]

It follows from these views that the order of the Circuit Court must be affirmed.

By the court.

Order Affirmed.

[1] And so in Compton v. Wilder, 40 Ohio St. 130 (same state of facts). Privilege also recognized in case of a non-resident held to bail on a criminal charge, Kaufman v. Garner, 173 Fed. 550; Martin v. Bacon, 76 Ark. 158, 6 Am. & Eng. Annotated Cases, 336.

Contra: Netograph Manufacturing Co. v. Scrugham, 197 N. Y. 377, 27 L. R. A. (N. S.) 333, in which Werner, J., said: "The privilege should, therefore, not be extended beyond the reason of the rule upon which it is founded. Since the obvious reason of the rule is to encourage voluntary attendance upon courts and to expedite the administration of justice, that reason fails when a suitor or witness is brought into the jurisdiction of a court while under arrest or other compulsion of law. Such a suitor or witness does nothing to encourage or promote voluntary submission to judicial proceedings. He comes because he cannot do otherwise. That seems to be the basis for the exception to the general rule of privilege which is illustrated in cases where persons are brought into the jurisdiction of a court under extradition from other states or foreign countries. (Williams v. Bacon, 10 Wend. 636; Slade v. Joseph, 5 Daly, 187; Adriance v. Lagrave, 59 N. Y. 110; People ex rel. Post v. Cross, 135 N. Y. 536.) The privilege is held not to exist in such cases. From time immemorial it has been the law that persons actually in custody under criminal process are not exempt from service of process in civil suits. (1 Chitty's Cr. L. 661; Foster Cr. L. 61, 62; Tidd's Pr. 306; 2 Archb. Pr. 122.)

STEIN v. VALKENHUYSEN.

Ellis, Blackburn & Ellis, 65. [*1858.*]

WIGHTMAN, J. In this case it appears that the defendant, being indebted to the plaintiffs on a cause of action which accrued abroad, was induced by a Mr. Smith to believe that he would have benefit from a personal interview with some party in England, and to come here in consequence, and that, on his doing so, he was immediately arrested. The first question is one of fact: Was he induced to come by a fraud to which the plaintiffs were privy? Now, on these affidavits, I entertain no doubt whatever that all the representations of Smith were mere fictions, made solely for the purpose of inducing the defendant to come to England that he might be arrested, and that the plaintiffs were parties to this delusion which produced the desired effect of bringing the defendant here, where he never would have come had he known the truth. Then, having no doubt at all that the defendant was lured to this country by the fraud of the plaintiffs, the next question arises, and it seems to be that the plaintiffs are disabled from taking advantage of their own fraud. It is much as if the plaintiffs had given the defendant an express undertaking that he should not be arrested whilst in England. I cannot doubt that, by giving such an undertaking, the plaintiffs would disqualify themselves from procuring an arrest. Bringing the defendant here by fraud has at least as much effect as if there were an express promise. In Hitchcock v. Hunter (5 Jurist, 770) this court, after consideration, thought the statute not imperative. If we have a discretion (and I do not doubt the authority of that case), this is a case for the exercise of it. But I proceed on the ground that a party cannot avail himself of his own fraud.

H. Hawkins inquired whether the rule was to be absolute to set aside the service of the writ as well as the order.

PER CURIAM. The whole was an abuse of the process. It must all be set aside.

Rule absolute accordingly.[1]

[1] Accord: Wanzer v. Bright, 52 Ill. 35. As to what constitutes fraud, see Jaster v. Currie, 198 U. S. 144.

(c) *Waiver of Process or Service.*

REX v. HARE AND MANN.

1 Strange, 145. [*1719.*]

Scire facias out of the petty bag to repeal letters patents, returnable *coram nobis in Cancellaria nostra in octabis purificationis beatae Mariae virginis ubicunque tunc fuerit.* The defendants, *salvis,* etc., pray *oyer* of the writ, and then plead in abatement, that the writ ought to have been returnable *coram domino rege in Cancellaria sua ubicunque eadem Cancellaria tunc foret in Anglia,* and not generally *ubicunque tunc foret.* To this the attorney general demurs.

YORKE (counsel for defendants). In order to avoid the force of this argument in the present case, some objections have been made of the other side.

The first is that our exception comes too late, for that it is now aided by the appearance of the defendant. And this was enforced by observing, that it was absurd to say this defendant had an hardship put upon him by being summoned to appear in Scotland, when the court was at Westminster at the return, and he has appeared here.

The answer to this is that it is not helped by appearance, because the defendant has come in specially, saving to himself all advantages whatsoever, and has challenged this defect by plea.

I may agree, without prejudice to this question, that possibly if the defendant had come in and not replied upon this exception, but pleaded over some matter of bar, that might have precluded him from taking this advantage afterwards. But when he expressly comes in for this special purpose, I apprehend he may insist upon it.

I do admit that any error in *mesne* process is salved by the party's appearance, and he shall not afterwards take advantage of it, because the only intent of *mesne* process is to bring the defendant into court, and when he is come in, that is out of the case, for he might have come in upon the writ without it. But an original writ (as a *scire facias* to repeal letters patents was determined to be in the case of The King v. Eyre) is of another nature, for that is not only to bring in the party, but also to found the jurisdiction of the court in that particular cause, and

to be the ground work of all the proceedings of the court afterwards. And I know no case in the law where it has been held that an appearance has cured any error in the original writ.[1]

WESTALL v. FINCH.

Barne's Notes, 406. [*1735.*]

Defendant moved to stay the proceedings, the process not having been served upon him, but upon another person, and obtained a rule to show cause. Upon showing cause, it was insisted by plaintiff that although the process might be served upon a wrong person, yet an appearance being now entered, the defendant was in court, and the mistake was cured. But *per Cur.:* The appearance is entered by plaintiff according to the statute,[1] and by no means cures the mistake. Let the rule be absolute. HAWKINS, for defendant; WRIGHT, for plaintiff.

HAWKINS v. TAYLOR.

56 Arkansas, 45. [*1892.*]

Taylor was plaintiff in a judgment in the Circuit Court of Franklin county against P. R. Cravens & Co., upon which execution was issued on February 26, 1890, and on same day placed in the hands of J. D. Hawkins, sheriff of Crawford county. On the 26th day of April, 1890, he, as such sheriff, endorsed the execution, "no property found," and on April 28, 1890, mailed the execution with his return endorsed thereon to the circuit clerk of Franklin county, by whom it was received on the same day. On May 12, 1890, notice was served on Hawkins of a motion for summary judgment for failure to return the execution within sixty days, which motion was filed on June 13, 1890. Defendant moved to strike the motion from the files; this motion was over-

[1] The court held that the writ was properly framed.

[1] See note to Collins v. Page, *post* 174.

ruled. Defendant answered, stating (1) that the execution was returned as required by law; (2) that the judgment upon which the execution was issued was void and the execution a nullity. Upon the evidence the court rendered judgment against defendant for the amount of the execution and interest, with ten per cent damages thereon. Defendant has appealed.

COCKRILL, C. J. The proceeding was instituted by motion for summary judgment under sections 3963-4, and it is argued that the plaintiff's cause should fall because those sections, as held above, do not apply. But the complaint contains all the allegations necessary to a recovery under section 3061. The defendant demurred to it, and, after the demurrer had been overruled and the cause continued to another term, consented to an order setting aside the continuance, filed his answer and went to trial. Either of these acts was sufficient to enter his appearance and waive the formal issue and service of summons. The defendant was therefore in court, and cannot now be heard to object that he was brought in by notice instead of summons.[1]

PLANO MFG. CO. v. RASEY.

69 Wisconsin, 246. [*1887.*]

COLE, C. J. This action was commenced before a justice of the peace of Rock county, where, after trial, a judgment was rendered in favor of the appellant. From this judgment the respondent took an appeal to the Circuit Court, in which court he recovered the judgment from which this appeal is taken. It is now claimed that the Circuit Court never acquired jurisdiction of the cause and had no power to render the judgment it did; that the municipal court of Rock county has exclusive jurisdiction of all appeals from justices' courts of that county, and that the appeal of the respondent in the first instance should have been to that court. That point was so ruled in Taylor v. De Camp, 68 Wis. 162. The learned counsel for the respondent seeks to avoid the consequences of this decision by insisting that,

[1] See also Dennison v. Hyde, 6 Conn. 508; Cofrode v. Gartner, 79 Mich. 332; Walker v. King, 1 How. (Miss.) 17.

under the circumstances, the objection to the jurisdiction of the Circuit Court must be deemed waived and no longer available. He says, quite truly, that the Circuit Court would have had jurisdiction of the action if it had been commenced in that court; might have tried it and rendered judgment therein; and upon the record he says, we should presume that the parties voluntarily appeared in that court, submitted themselves to its jurisdiction, and are bound by its judgment.

It certainly would be a most unwarranted presumption to sustain that view, contrary to everything appearing in the record. For we find in the record papers sent to the Circuit Court by the justice, among which are the notice of appeal, affidavit and undertaking, given by the respondent on his taking his appeal to the Circuit Court, all of which we are asked to ignore or treat as of no effect whatever. This is surely a summary and novel way of disposing of the record of a court—to utterly disregard it or shut our eyes to its existence. We do not feel at liberty to do that in any case. We must therefore assume and hold, according to the real fact, that this case was attempted to be taken by appeal from the justice to the Circuit Court. It is elementary law that the Circuit Court acquires jurisdiction of appeals from the justices' courts under the statute. And probably a hundred cases could be found where this court has decided that the Circuit Court only acquires jurisdiction of an appeal where the requirements of the statute, regulating appeals, are complied with. So a defective affidavit, or notice of appeal, or a claim before the justice, exceeding his jurisdiction, have been held fatal to the jurisdiction of the Circuit Court. We shall not attempt to cite the cases upon this question of practice.

What, then, results from the fact that the respondent took his appeal from the justice to the Circuit Court, which under the statute had no jurisdiction of the cause? It is too plain for argument that the judgment cannot stand, and must be reversed. It may come with bad grace for the appellant to object to the jurisdiction of the Circuit Court, after having gone into that court and tried the cause upon the merits. But still it has the right to take advantage of the objection, because it is in its nature a question of jurisdiction of the subject-matter, which consent cannot supply. For while consent gives jurisdiction of the person, it never confers jurisdiction of the subject-matter.

In Dykeman v. Budd, 8 Wis. 640, the parties attempted by

consent to give the Circuit Court jurisdiction of a cause on appeal where, under the statute, such court could only acquire jurisdiction by an order of the County Court, changing the venue. The court in the opinion says: "If jurisdiction could be acquired of appeals by the Circuit Court by stipulation of parties, consent would open a clear and direct path from the justice to the Circuit Court, without the intervention of the County Court at all." See the note to this case. Also Clark v. Bowers, 2 Wis. 123; Verbeck v. Verbeck, 6 Wis. 159; Miles v. Chamberlain, 17 Wis. 447; Felt v. Felt, 19 Wis. 193; Ohse v. Bruss, 45 Wis. 442; Palmer v. Peterson, 46 Wis. 402. We deem it unnecessary to refer to cases where it has been held that an appearance or consent gives jurisdiction of the person; those cases are distinguishable from the one before us. The real proposition here is, did the Circuit Court acquire jurisdiction of the subject matter on the appeal? We think it did not, though that court would have jurisdiction of a claim of $160, the price of the reaper, if the action had been commenced in that court.

It follows, therefore, from these views, that the judgment of the Circuit Court must be reversed.

ST. LOUIS RAILWAY CO. v. McBRIDE.

141 U. S. 127. [*1890.*]

Mr. Justice BREWER delivered the opinion of the court.

This was an action commenced by the filing of a complaint on September 19, 1890, in the Circuit Court of the United States for the Western District of Arkansas. The defendants in error were plaintiffs below. They alleged that they were respectively the widow and children of James A. McBride, deceased, and his next of kin and heirs at law, and that there were no personal representatives of the said deceased. They further alleged that they were citizens and residents of the Western District of Arkansas; that the railway defendant was a corporation and citizen of the State of Missouri, doing business in the State of Arkansas and the Indian Territory, owning maintaining and operating a line of railway through said States and Territory; that on the 20th day of July, 1890, the deceased, James A. Mc-

Bride, was in the employ of defendant; and that on that day, and in the Indian Territory, while at work as a brakeman on a freight train, he was, through the negligence of said defendant, so injured that on the 22d day of July he died. The complaint further disclosed the circumstances under which the accident occurred; alleged the dependence of the plaintiffs upon the deceased for support and prayed judgment for twenty thousand dollars damages.

The record contains no process, or service thereof. On the 4th day of November, 1890, the defendant filed a demurrer, on three grounds as follows: "1st. Because the court has no jurisdiction of the person of the defendant. 2d. Because the court has no jurisdiction of the subject matter of the action. 3d. Because the complaint does not state facts sufficient to constitute a cause of action." This demurrer was overruled; and in January, 1891, a trial was had, resulting in a verdict for plaintiffs in the sum of four thousand dollars. No answer appears in the record, though it is proper to say that counsel for defendants in error, in their brief, states that service of process was made upon the defendant by delivering a copy to its station agent at Fort Smith, Arkansas; and that an answer was filed denying the defendant's negligence, and setting up also contributory negligence on the part of the deceased, but not denying any of the allegations in respect to the citizenship and residence of the parties. The fact of an answer seems also to be implied from the record of the trial, which recites that "after all the evidence had been introduced by both parties to maintain their respective issues, etc." Judgment was entered on the verdict for the sum of four thousand dollars, and of this judgment plaintiff in error complains.

As the judgment did not exceed five thousand dollars, the case can only come to this court on the question of the jurisdiction of the Circuit Court. 25 Stat. 693, c. 236; McCormick Harvesting Machine Co. v. Walthers, 134 U. S. 41.

The action was one to recover money, the sum claimed being in excess of two thousand dollars, and was between citizens of different States, and was brought in the district and State of the residence of the plaintiffs. It was a case, therefore, within the general jurisdiction of the Circuit Courts of the United States, under section 1 of chapter 866, 25 Stat. 433; and if the jurisdiction was founded only on the fact that the action was between

citizens of different States it was brought in the Circuit Court of a proper district.

The contention of plaintiff in error is, that the jurisdiction is not founded only on the matter of diverse citizenship, but that it is an action based upon a statute of the United States, and to enforce a right given solely by such statute, and is therefore one which must be brought in the district of which the defendant was an inhabitant. Its contention goes further than this. It insists that under a proper construction of the United States statutes there was no cause of action existing in favor of the plaintiffs. It will be observed that the action is one to recover damages for the wrongful acts of defendant, in causing the death of the husband and father of the respective plaintiffs. Such an action did not survive at common law. The wrongful acts of defendant were done in the Indian Territory. On May 2, 1890, an act was passed by Congress with respect to the Territory of Oklahoma and the Indian Territory. Act of May 2, 1890, 26 Stat. 81, c. 182. The 31st section extended over the Indian Territory the provisions of certain specified statutes of Arkansas, among them one chapter relating to "pleadings and practice, chapter 119;" and in that chapter, by sections 5225 and 5226, it is provided that in case of injuries causing death a right of action survives, the statute being substantially like that now in force in most States of the Union. The plaintiff in error contends that the effect of the act of Congress extending this chapter over the Indian Territory was not to put in force therein all its sections, but only those relating to pleadings and practice; and that, therefore, there being no other law than the common law in force in the Indian Territory, the complaint stated no cause of action. And further, as heretofore stated, that, if those sections in respect to the surviving of actions were extended to the Territory, the action was founded on the statute of the United States alone, and such an action must be brought in the district of which the defendant is an inhabitant.

The first of these questions is not open to inquiry in this case. The complaint making no reference to the Federal statute, alleges wrongful acts on the part of the defendant and prays to recover damages therefor. Whether upon those facts the plaintiffs are entitled to recover is not a matter of jurisdiction, but one of the merits of the controversy. Suppose in a State where there is no statute providing for the surviving of such an action a

suit is brought by the widow and children of a deceased person, alleging that his death was caused by the wrongful act of the defendant, and the defendant having been served with process enters its appearance and denies all liability, and the trial court improperly holds that there was liability and renders judgment for damages, is there anything other than a matter of erroneous ruling upon the merits? Could it be held that the court had no jurisdiction, no right to hear and determine the controversy between the parties? So, here, whether there was or was not a statute in force in the Indian Territory, providing that an action should survive in case of death, and whether upon the facts stated in the complaint the plaintiffs had a cause of action against the defendant, were questions entering into the merits of the controversy, and not matters affecting the jurisdiction of the court. If it had jurisdiction of the parties, it had the right to inquire and determine whether upon those facts the plaintiffs were entitled to judgment.

Neither can the other contention of plaintiff in error be sustained. Assuming that service of process was made, although the record contains no evidence thereof, and that the defendant did not voluntarily appear, its first appearance was, not to raise the question of jurisdiction alone, but also that of the merits of the case. Its demurrer, as appears, was based on three grounds: Two referring to the question of jurisdiction, and the third, that the complaint did not state facts sufficient to constitute a cause of action. There was, therefore, in the first instance, a general appearance to the merits. If the case was one of which the court could take jurisdiction, such an appearance waives not only all defects in the service, but all special privileges of the defendant in respect to the particular court in which the action is brought.

The first part of section 1 of the act of 1887, as amended in 1888, gives, generally, to the Circuit Courts of the United States, jurisdiction of controversies between citizens of different States where the matter in dispute exceeds the sum of two thousand dollars, exclusive of interest and costs. Such a controversy was presented in this complaint. It was, therefore, a controversy of which the Circuit Courts of the United States have jurisdiction. Assume that it is true, as defendant alleges, that this is not a case in which jurisdiction is founded only on the fact that the controversy is between citizens of different States, but

that it comes within the scope of that other clause, which provides that "no civil suit shall be brought before either of said courts, against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant," still the right to insist upon suit only in the one district is a personal privilege which he may waive, and he does waive it by pleading to the merits. In Ex parte Schollenberger, 96 U. S. 369, 378, Chief Justice WAITE said: "The act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive." The judiciary act of 1789, section 11, 1 Stat. 79, besides giving general jurisdiction to Circuit Courts over suits between citizens of different States, further provided, generally, that no civil suit should be brought before either of said courts, against an inhabitant of the United States, by any original process, in any other district than that of which he was an inhabitant, or in which he should be found. In the case of Toland v. Sprague, 12 Pet. 300, 330, it appeared that the defendant was not an inhabitant of the State in which the suit was brought, nor found therein. In that case the court observed: "It appears that the party appeared and pleaded to issue. Now, if the case were one of a want of jurisdiction in the court, it would not, according to well-established principles, be competent for the parties by any acts of theirs to give it. But that is not the case. The court had jurisdiction over the parties and the matter in dispute; the objection was that the party defendant, not being an inhabitant of Pennsylvania, nor found therein, personal process could not reach him. * * * Now, this was a personal privilege or exemption, which it was competent for the party to waive. The cases of Pollard v. Dwight, 4 Cranch, 421, and Barry v. Foyles, 1 Pet. 311, are decisive to show that, after appearance and plea, the case stands as if the suit were brought in the usual manner. And the first of these cases proves that exemption from liability to process, and that in case of foreign attachment, too, is a personal privilege, which may be waived, and that appearing and pleading will produce that waiver." In Lexington v. Butler, 14 Wall. 282, the jurisdiction of the Circuit Court over a controversy between citizens of different States was sustained in a case removed from the state court, although it was conceded that the suit could not have been commenced in

the first instance in the Circuit Court. See also Claflin v. Commonwealth Ins. Co., 110 U. S. 81.

Without multiplying authorities on this question, it is obvious that the party who in the first instance appears and pleads to the merits waives any right to challenge thereafter the jurisdiction of the court on the ground that the suit has been brought in the wrong district. Charlotte Nat. Bank v. Morgan, 132 U. S. 141; Fitzgerald Construction Co. v. Fitzgerald, 137 U. S. 98.

It follows from these considerations that the Circuit Court had jurisdiction; and, as that is the only question before us, the judgment must be

Affirmed.

JONES v. MERRILL.

113 Michigan, 433. [*1897.*]

Ejectment by Susan L. Jones against Esther E. Merrill. The plaintiff claimed title under a foreclosure sale based on a decree *pro confesso*. There was a judgment for plaintiff on a directed verdict, and the defendant sued out a writ of error.

MONTGOMERY, J. The validity of the foreclosure proceeding depends wholly upon the question of whether the court obtained jurisdiction by an acceptance of service signed by the defendant in that proceeding in Montana. The language of the acceptance indorsed upon the subpoena was as follows: "I hereby admit due personal service upon me of the within subpoena this 11th day of September, 1894.

"MELISSA C. LIVERMORE."

We had occasion to refer to this subject in Allured v. Voller, 107 Mich. 476. In that case it appeared that there was an acceptance beyond the jurisdiction of the court, in which acceptance there was also a waiver of formal service by an officer, and a permission to the plaintiff to proceed with the case the same as though service had been made as commanded in said summons. As was said in that case, the authorities are not harmonious upon the subject of a mere acceptance of the service of a writ beyond the jurisdiction of the court. It became unnecessary for us to determine the effect of such acceptance in that case, as we

deemed that there was an express waiver and authority in writing conferred upon the plaintiff to proceed with the case. In the present case it is unnecessary to determine the effect of a mere acceptance of a service shown upon its face to be beyond the jurisdiction of the court. In this case the acceptance purports to be an acceptance of due personal service, which means a service which will confer jurisdiction upon the court. The case of Cheney v. Harding, 21 Neb. 65, goes further than is necessary to sustain the holding of the circuit judge in this case. In that case the admission of service showed upon its face that the service was made at the residence of the party, in another State. Yet the court held that the defendant was bound by such acknowledgment or acceptance of service, even though outside the territorial jurisdiction of the court to which it was returnable.

In the early case of Dunn v. Dunn, 4 Paige 430, Chancellor Walworth said: "In all cases where the court has jurisdiction over the subject-matter of the suit, if the defendant, who is beyond the limits of the State, thinks proper to waive that objection by a voluntary appearance, or by consenting to accept as regular the service of process upon him at the place where he resides or is found, he cannot afterwards object to the regularity of the proceedings against him, founded on such service."

In the case of Vermont Farm Machine Co. v. Marble, 20 Fed. 117, it appeared that the defendant accepted service of the subpoena, "to have the same effect as if duly served on him by proper officer." It was held that in so accepting service the defendant subjected himself to the jurisdiction of a court sitting in a district of which he was not a resident. See, also, Ex parte Schollenberger, 96 U. S. 369; Laramore v. Chastian, 25 Ga. 592; Shaw v. National State Bank, 49 Iowa, 179. The case of Weatherbee v. Weatherbee, 20 Wis. 499, distinctly holds the opposite doctrine. But that case is in conflict with our own holding in Allured v. Voller, and an attempt was made to distinguish it in Keeler v. Keeler, 24 Wis. 522. We think it an entirely safe rule that a party may waive service of process by any act clearly evidencing an intention to do so. The bare admission of the fact of service beyond the territorial jurisdiction of the court should not be deemed a waiver. But an admission of service so worded as to clearly evidence an intent to waive further service

should be held to amount to a waiver. Such intent is clear in the present case.[1]

ANONYMOUS.

1 Chitty, 129. [*1819.*]

Walford moved to set aside the writ of latitat on the ground of irregularity, it appearing that the writ was served on the 25th of January, but tested only on the 30th, on which day it was returnable. He thought it necessary, however, to state that on the 28th of January, before the return of the writ, the defendant's attorney wrote a letter to the plaintiff, stating that he would appear and receive a declaration, and at the same time offered security for costs. The time for appearing was not yet out.

ABBOTT, C. J. At the time the defendant's attorney wrote that letter, he had not discovered the error in the writ. I think, however, he is bound by his undertaking. This is not the time, therefore, for him to take advantage of the objection. The writ is in itself defective, but the defendant's attorney has waived the objection by undertaking to appear, and consequently it is now too late to avail himself of it.

Rule refused.[1]

[1] Accord: Richardson v. Smith, 11 Allen, 134; Compare Weatherbee v. Weatherbee, 20 Wis. 499; and see following remarks of Dixon, C. J., in Keeler v. Keeler, 24 Wis. 522. "The admission by the defendant of the service of process is but evidence of such service. It is evidence of the same force, and no greater, than if proof of service were made in some other manner. In either case, the court acquires jurisdiction, if at all, through the service of the process; and in both alike, the service is void, if it appears that it was made out of the state without an order of publication. And the waiver by the party of any other service made out of the state does not cure the defect. But an appearance in an action is a very different matter. An appearance may be made without the issuing or service of any process whatsoever, whether by publication or otherwise. It may be made as well by a party residing without the state as one within it. An appearance is a waiver of all previous defects in the service of process, and of the process itself, if none has been issued. Upper Miss. Trans. Co. v. Whittaker, 16 Wis. 220.

The defendant having, therefore, made a valid appearance in the action, it follows that the judgment must be affirmed.

[1] Compare Scholfield, J., in Soles v. Sheppard, 96 Ill. 131, "All that is shown by the affidavit filed in

YORK v. TEXAS.

137 U. S. 15. [*1890.*]

On the 14th day of November, 1888, a personal judgment was rendered in the District Court of Travis County, Texas, against the plaintiff in error, which judgment was subsequently affirmed by the Supreme Court of the State. Error is now alleged in this, that the District Court had no jurisdiction of the person of the defendant. The record discloses that on October 20, 1885, the defendant leased from the State certain school lands, at a stipulated rental. The lease provided that in all suits thereunder the venue should be laid in Travis County, Texas. The State filed its petition on February 15, 1888, alleging non-payment of the rent due in 1886 and 1887. The defendant being a non-resident, a citizen of St. Louis, Missouri, a notice in accordance with the provisions of the statute was served upon him personally in that city. No question is made but that the service was in strict conformity with the letter of the statute. On March 9, 1888, the defendant appeared by his counsel and filed a special plea, challenging the jurisdiction of the court on the ground that he was a non-resident and had not been served personally with process within the limits of the State. This plea was overruled. Thereafter, and on the 5th day of October, 1888, the defendant appeared by his attorneys in open court, demanded a jury, paid the jury fee, and had the cause transferred to the jury docket. On the 6th day of October he again filed a plea to the jurisdiction, on the same ground, which was also overruled. On the 14th day of November, when the cause was reached and called for trial, he again appeared by his attorneys, waived his right of trial by a jury and his demand of a jury and declined to further answer to the cause—relying solely upon his plea to the jurisdiction. The court thereupon proceeded to render judgment against him, which, as heretofore stated, was affirmed by the Supreme Court. 73 Texas, 651.

support of this motion is, that the attorney for the defendant in error made an agreement that he would enter the appearance of his client, and has violated that agreement. This might give a cause of action against the attorney, but it does not constitute an appearance. No *scire facias* has been served, nor has there been any publication of notice. The defendant in error is not in court.

Motion denied.

Mr. Justice BREWER, after stating the case as above reported, delivered the opinion of the court.

It was conceded by the District and the Supreme Courts that the service upon the defendant in St. Louis was a nullity, and gave the District Court no jurisdiction; but it was held that, under the peculiar statutes of the State of Texas, the appearance for the purpose of pleading to the jurisdiction was a voluntary appearance, which brought the defendant into court. Plaintiff in error questions this construction of the Texas statutes; but, inasmuch as the Supreme Court, the highest court of the State, has so construed them, such construction must be accepted here as correct, and the only question we can consider is, as to the power of the State in respect thereto.

It must be conceded that such statutes contravene the established rule elsewhere—a rule which also obtained in Texas at an earlier day, to-wit, that an appearance which, as expressed, is solely to challenge the jurisdiction, is not a general appearance in the cause and does not waive the illegality of the service or submit the party to the jurisdiction of the court.[1] Harkness v. Hyde, 98 U. S. 476; Raquet v. Nixon, Dallas (Texas), 386; DeWitt v. Monroe, 20 Texas, 289; Hagood v. Dial, 43 Texas, 625; Robinson v. Schmidt, 48 Texas, 19.

The difference between the present rule in Texas and elsewhere is simply this: Elsewhere the defendant may obtain the judgment of the court upon the sufficiency of the service, without submitting himself to its jurisdiction. In Texas, by its statute, if he asks the court to determine any question, even that of service, he submits himself wholly to its jurisdiction. Elsewhere he gets an opinion of the court before deciding on his own action. In Texas he takes all the risk himself. If the service be in fact insufficient, all subsequent proceedings, including the formal entry of judgment, are void; if sufficient, they are valid. And the question is, whether under the Constitution of the United States the defendant has an inviolable right to have this question of the sufficiency of the service decided in the first instance and alone.[2]

[1] But see Griggs v. Gilmer, 54 Ala. 425, *post* 174.

[2] But a rule of court attempting to make a special appearance operate as a general appearance has been held unreasonable, Huff v. Shepard, 58 Mo. 242.

The Fourteenth Amendment is relied upon as invalidating such legislation. That forbids a State to "deprive any person of life, liberty or property, without due process of law." And the proposition is, that the denial of a right to be heard before judgment simply as to the sufficiency of the service operates to deprive the defendant of liberty or property. But the mere entry of a judgment for money, which is void for want of proper service, touches neither. It is only when process is issued thereon or the judgment is sought to be enforced that liberty or property is in present danger. If at that time of immediate attack protection is afforded, the substantial guarantee of the amendment is preserved, and there is no just cause of complaint. The State has full power over remedies and procedure in its own courts, and can make any order it pleases in respect thereto, provided that substance of right is secured without unreasonable burden to parties and litigants. Antoni v. Greenhow, 107 U. S. 769. It certainly is more convenient that a defendant be permitted to object to the service, and raise the question of jurisdiction, in the first instance, in the court in which suit is pending. But mere convenience is not substance of right. If the defendant had taken no notice of this suit, and judgment had been formally entered upon such insufficient service, and under process thereon his property, real or personal, had been seized or threatened with seizure, he could by original action have enjoined the process and protected the possession of his property. If the judgment had been pleaded as defensive to any action brought by him, he would have been free to deny its validity. There is nothing in the opinion of the Supreme Court or in any of the statutes of the State, of which we have been advised, gainsaying this right. Can it be held, therefore, that legislation simply forbidding the defendant to come into court and challenge the validity of service upon him in a personal action, without surrendering himself to the jurisdiction of the court, but which does not attempt to restrain him from fully protecting his person, his property and his rights against any attempt to enforce a judgment rendered without due service of process, and therefore void, deprives him of liberty or property, within the prohibition of the Fourteenth Amendment? We think not.

The judgment is affirmed.

Mr. Justice BRADLEY and Mr. Justice GRAY dissented.

GOLDEY v. MORNING NEWS.

156 U. S. 518. [*1894.*]

Plaintiff brought suit in the State Court against the defendant, a foreign corporation, and caused summons to be served on its president while casually in the State. The defendant removed the case to the Circuit Court of the United States, where the service was vacated and the action dismissed on motion. Plaintiff sued out a writ of error.[1]

Mr. Justice GRAY, after stating the case, delivered the opinion of the court. It was contended, in behalf of the plaintiff, that the defendant, by filing in the State Court a petition for the removal of the case into the Circuit Court of the United States, had treated the case as actually and legally pending in the court of the State, and had waived all defects in the service of the summons. The position is supported by a decision of Mr. Justice CURTIS in Sayles v. Northwestern Ins. Co., 2 Curtis, 212; by a dictum of Chief Justice CHASE in Bushnell v. Kennedy, 9 Wall. 387, 393; by opinions of Judge COXE in Edwards v. Connecticut Ins. Co., 20 Fed. Rep. 452, and Judge SAGE in Tallman v. Baltimore & Ohio Railroad, 45 Fed. Rep. 156; and by the judgment of the Court of Appeals of New York in Farmer v. National Life Association, 138 N. Y. 265.

But the ground of the decision in Bushnell v. Kennedy was, in accordance with earlier and later decisions, that the restriction, in former judiciary acts, upon the jurisdiction of the Circuit Court over a suit originally brought by an assignee, which his assignor could not have brought in that court, did not apply to its jurisdiction by removal of an action originally brought in a State Court. Green v. Custard, 23 How. 484; Lexington v. Butler, 14 Wall. 282; Claflin v. Commonwealth Ins. Co., 110 U. S. 81; Delaware County v. Diebold Co., 133 U. S. 473. And the theory that a defendant, by filing in the State Court a petition for removal into the Circuit Court of the United States, necessarily waives the right to insist that for any reason the State Court had not acquired jurisdiction of his person, is inconsistent with the terms, as well as with the spirit, of the existing act of

[1] The statement has been condensed for a full statement see *post*, p. 111.

Congress regulating removals from a court of a State into the Circuit Court of the United States.

The jurisdiction of the Circuit Court of the United States depends upon the acts passed by Congress pursuant to the power conferred upon it by the Constitution of the United States, and cannot be enlarged or abridged by any statute of a State. The legislature or the judiciary of a State can neither defeat the right given by a constitutional act of Congress to remove a case from a court of the State into the Circuit Court of the United States, nor limit the effect of such removal. Gordon v. Longest, 16 Pet. 97; Insurance Co. v. Morse, 20 Wall. 445; Barron v. Burnside, 121 U. S. 186; Southern Pacific Co. v. Denton, 146 U. S. 202, 207-209. As was said by this court in Gordon v. Longest, "One great object in the establishment of the courts of the United States and regulating their jurisdiction was to have a tribunal in each State, presumed to be free from local influence, and to which all who were non-residents or aliens might resort for legal redress." 16 Pet. 104.

The act of Congress, by which the practice, pleadings and forms and modes of proceeding, in actions at law in the Circuit Court of the United States, are required to conform, as near as may be, to those existing at the time in the courts of the State within which it is held, applies only to cases of which the court has jurisdiction according to the Constitution and laws of the United States. Rev. Stat. § 914; Southern Pacific Co. v. Denton, above cited; Mexican Central Railway Co. v. Pinkney, 149 U. S. 194.

By the act of Congress, under which the present action was removed by the defendant into the Circuit Court of the United States, any action at law, brought in a court of a State between citizens of different States, in which the matter in dispute exceeds the sum or value of $2,000 may be removed into the Circuit Court of the United States by the defendant being a non-resident of that State, by filing a petition and bond in the State Court "at the time or at any time before the defendant is required by the laws of the State, or the rule of the State Court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff;" and it shall then be the duty of the State Court to proceed no further in the suit; and, upon the entry of a copy of the record in the Circuit Court of the United States, "the cause shall then proceed in the same manner as if it had been

originally commenced in said Circuit Court." Act of August 13, 1888, c. 866; 25 Stat. 434, 435.

It has been held by this court, upon full consideration, that the provision of this act, that the petition for removal shall be filed in the State Court at or before the time when the defendant is required by the local law or rule of court "to answer or plead to the declaration or complaint," requires the petition to be there filed at or before the time when the defendant is so required to file any kind of plea or answer, "whether in matter of law, by demurrer, or in matter of fact, either by dilatory plea to the jurisdiction of the court or in suspension or abatement of the particular suit, or by plea in bar of the whole right of action," because, as the court said, "Construing the provision now in question, having regard to the natural meaning of its language, and to the history of the legislation upon this subject, the only reasonable inference is that Congress contemplated that the petition for removal should be filed in the State Court as soon as the defendant was required to make any defense whatever in that court, so that, if the case should be removed, the validity of any and all of his defenses should be tried and determined in the Circuit Court of the United States." Martin v. Baltimore & Ohio Railroad, 151 U. S. 673, 686, 687.

As the defendant's right of removal into the Circuit Court of the United States can only be exercised by filing the petition for removal in the State Court before or at the time when he is required to plead in that court to the jurisdiction or in abatement, it necessarily follows that, whether the petition for removal and such a plea are filed together at that time in the State Court; or the petition for removal is filed before that time in the State Court and the plea is seasonably filed in the Circuit Court of the United States after the removal, the plea to the jurisdiction or in abatement can only be tried and determined in the Circuit Court of the United States.

Although the suit must be actually pending in the State Court before it can be removed, its removal into the Circuit Court of the United States does not admit that it was rightfully pending in the State Court, or that the defendant could have been compelled to answer therein; but enables the defendant to avail himself, in the Circuit Court of the United States, of any and every defense, duly and seasonably reserved and pleaded, to the

action, "in the same manner as if it had been originally commenced in said Circuit Court."

How far a petition for removal, in general terms, without specifying and restricting the purpose of the defendant's appearance in the State Court, might be considered, like a general appearance, as a waiver of any objection to the jurisdiction of the court over the person of the defendant, need not be considered; because, in the petition filed in the State Court for the removal of this action into the Circuit Court of the United States, it was expressed that the defendant appeared specially and for the sole and single purpose of presenting the petition for removal.[2] This was strictly a special appearance for this purpose only, and, whether the attempt to remove should be successful or unsuccessful, could not be treated as submitting the defendant to the jurisdiction of the State Court for any other purpose. Likewise, in the motion filed by the defendant in the Circuit Court of the United States, immediately after the action had been removed into that court, for an order setting aside the summons and the service thereof, it was expressed that the defendant appeared by its attorney specially for the purpose of applying for this order. Irregularity in a proceeding by which jurisdiction is to be obtained is in no case waived by a special appearance of the defendant for the purpose of calling the attention of the court to such irregularity. Harkness v. Hyde, 98 U. S. 476; Southern Pacific Co. v. Denton, 146 U. S. 202; Mexican Central Railway v. Pinkney, 149 U. S. 194.

The necessary conclusion appears to this court to be that the defendant's right to object to the insufficiency of the service of the summons was not waived by filing the petition for removal in the guarded form in which it was drawn up, and by obtaining

[2] The application for removal need not state that the appearance is limited to that purpose. By. v. Brow, 164 U. S. 271. But it is sometimes held that an appearance should be treated as general unless expressly limited to a jurisdictional matter, Deahler v. Foster, 1 Morris (Ia.) 403.

An application for a change of venue is usually held to be such an appearance as waives objections to jurisdiction over the person except where based on disqualifications of the judge, Freeman v. Burks, 16 Nebr. 328; Julian v. Star Pub. Co., 209 Mo. 35; but see dissenting opinion.

An application for time within which to determine whether to enter a general or special appearance does not operate as a waiver, Lowrie v. Castle, 198 Mass. 82.

a removal accordingly. And it is gratifying to know that this conclusion is in accord with the general current of decision in the Circuit Courts of the United States, Parrott v. Alabama Ins. Co., 5 Fed. Rep. 391; Blair v. Turtle, 1 McCrary, 372; Atchinson v. Morris, 11 Bissell, 191; Small v. Montgomery, 5 McCrary, 440, explaining Sweeney v. Coffin, 1 Dillon, 73, 76; Hendrickson v. Chicago, etc., Railway, 22 Fed. Rep. 569; Elgin Co. v. Atchison, etc., Railway, 24 Fed. Rep. 866; Kauffman v. Kennedy, 25 Fed. Rep. 785; Miner v. Markham, 28 Fed. Rep. 387; Perkins v. Hendryx, 40 Fed. Rep. 657; Clews v. Woodstock Co., 44 Fed. Rep. 31; Bentlif v. London & Colonial Corporation, 44 Fed. Rep. 667; Reifsnider v. American Publishing Co., 45 Fed. Rep. 433; Forrest v. Union Pacific Railroad, 47 Fed. Rep. 1; O'Donnell v. Atchinson, etc., Railroad, 49 Fed. Rep. 689; Ahlhauser v. Butler, 50 Fed. Rep. 705; McGillin v. Claflin, 52 Fed. Rep. 657.

Judgment affirmed.

LOWE v. STRINGHAM.

14 Wisconsin, 222. [*1861.*]

By the court, PAINE, J. This was an action of replevin commenced before a justice of the peace. The defendant appeared, and before answering moved to dismiss the suit, because the writ was returnable on the third day after it issued, not excluding a Sunday which intervened. The motion was denied, and the defendant excepted. He then answered and went to trial, and the plaintiff recovered judgment. The defendant appealed, and made the same objection in the Circuit Court, which was overruled and an exception taken.

We think the objection was good, and if properly taken advantage of, that the writ ought to have been quashed. The statute provides that the warrant "shall be made returnable on the third day after it shall issue (Sundays excepted), etc. R. S., chap. 120, sec. 134. * * *

But although the objection was good, we think the defendant waived it in several ways. The record of the justice shows that the parties appeared by their counsel, which, of course, in the

absence of any qualification, must be construed to be a general appearance. And it is a familiar rule, that a general appearance waives any defect in the process. This is too well settled to need the citation of authorities. To avoid the effect of this rule, it is the common practice, when it is desired to take advantage of such defects, to appear specially for that purpose only.

We think it is also a waiver of such a defect for the party, after making his objection, to plead and go to trial on the merits.[1] To allow him to do this would be to give him this advantage. After objecting that he was not properly in court, he could go in, take his chance of a trial on the merits, and if it resulted in his favor, insist upon the judgment as good for his benefit, but if it resulted against him, he could set it all aside upon the ground that he had never been properly got into court at all. If a party wishes to insist upon the objection that he is not in court, he must keep out for all purposes except to make that objection. Caughey v. Vance, 3 Chand. 315-16; Thayer v. Dove, 8 Blackf. 567.

We also think the defendant could not take advantage of this objection on an appeal to the Circuit Court, the judgment being over $15. The object of an appeal in such cases is to try the case anew in the Appellate Court on its merits, and not to review errors of the justice. The taking of such an appeal is equivalent to an appearance, and gives the Appellate Court jurisdiction over the person, whether the service of the process before the justice was sufficient for that purpose or not. Barnum v. Fitzpatrick, adm'r, etc., 11 Wis. 83, and cases cited. See also Hester v. Murphy, 1 Ark. 55; Ball v. Kuykendall, 2 id. 195; Ser v. Bobst, 8 Mo. 506; Matlock v. King, 23 id. 400. The remedy of the party in such a case would seem to be that pointed out in Wood v. Randall, 5 Hill, 264, that is a common law certiorari.

HARKNESS v. HYDE.

98 U. S. 476. [*1878.*]

Mr. Justice FIELD delivered the opinion of the court.

This was an action to recover damages for maliciously and

[1] Accord: Newcomb v. Ry., 182 Mo. 687; Edwards v. Traction Co., 217 Ill. 409.

without probable cause procuring the seizure and detention of property of the plaintiff under a writ of attachment. It was brought in September, 1873, in a District Court of the Territory of Idaho for the County of Oneida. The summons, with a copy of the complaint, was soon afterwards served by the sheriff of the county on the defendant, at his place of residence, which was on the Indian reservation, known as the Shoshonee reservation.

The defendant thereupon appeared specially by counsel appointed for the purpose, and moved the court to dismiss the action, on the ground that the service thus made upon him on the Indian reservation was outside of the bailiwick of the sheriff, and without the jurisdiction of the court. Upon stipulation of the parties the motion was adjourned to the Supreme Court of the Territory, and was there overruled. To the decision an exception was taken. The case was then remanded to the District Court, and the defendant filed an answer to the complaint. Upon the trial which followed the plaintiff obtained a verdict for $3,500. Upon a motion for a new trial the amount was reduced to $2,500, for which judgment was entered. On appeal to the Supreme Court of the Territory, the judgment was affirmed. The defendant thereupon brought the case here, and now seeks a reversal of the judgment, for the alleged error of the court in refusing to dismiss the action for want of jurisdiction over him.

The act of Congress of March 3, 1863, organizing the Territory of Idaho, provides that it shall not embrace within its limits or jurisdiction any territory of an Indian tribe without the latter's assent, but that "all such territory shall be excepted out of the boundaries, and constitute no part of the Territory of Idaho," until the tribe shall signify its assent to the President to be included within the Territory. 12 Stat. 808. * * * The territory reserved, therefore, was as much beyond the jurisdiction, legislative or judicial, of the government of Idaho as if it had been set apart within the limits of another country, or of a foreign State. Its lines marked the bounds of that government. The process of one of its courts, consequently, served beyond those lines, could not impose upon the defendant any obligation of obedience, and its disregard could not entail upon him any penalties. The service was an unlawful act of the sheriff. The court below should, therefore, have set it aside on its attention being called to the fact that it was made upon the defendant on the reservation. The motion was to dismiss the action, but it

was argued as a motion to set aside the service, and we treat it as having only that extent. The code of Idaho considers an action as commenced when the complaint is filed, and provides that a summons may be issued within one year afterwards. Had the defendant been found in Idaho outside the limits of the Indian reservation, he might during that period have been served with process.

There can be no jurisdiction in a court of a Territory to render a personal judgment against any one upon service made outside its limits. Personal service within its limits, or the voluntary appearance of the defendant, is essential in such cases. It is only where property of a non-resident or of an absent defendant is brought under its control, or where his assent to a different mode of service is given in advance, that it has jurisdiction to inquire into his personal liabilities or obligations without personal service of process upon him, or his voluntary appearance to the action. Our views of this subject are expressed at length in the late case of Pennoyer v. Neff (95 U. S. 714), and it is unnecessary to repeat them here.

The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground, or what we consider as intended, that the service be set aside; nor, when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when being urged it is overruled, and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived.[1]

[1] For a collection of the cases on this point, see Corbett v. Casualty Co., 16 L. R. A. (N. S.) 177 and note. It seems that at common law error in sustaining a demurrer to a plea in abatement was not waived by a plea in bar after judgment of *respondeat ouster*. Lockwood, J., in Delahay v. Clement, 4 Ill. 201 (1841): "This cause was decided at the last December term, but on a petition, this Court, at the present term, granted a re-hearing. The petition suggests that the Court mis-

The judgment of the Supreme Court of the Territory, therefore, must be reversed, and the case remanded with directions to reverse the judgment of the District Court for Oneida County, and to direct that court to set aside the service made upon the defendant; and it is

So ordered.

took the law, by deciding "that where a demurrer to a plea in abatement is sustained, if the defendant files a plea in bar, he thereby waives his plea in abatement." This Court, in the case of McKinstry v. Pennoyer et al. (1 Scam. 319), decided, that "if there be judgment for the plaintiff, on demurrer to a plea in abatement, or replication to such plea, the judgment is only interlocutory, *quod respondeat ouster.*" Upon the principles decided in that case, it is the order and judgment of the Court, without the request of the defendant, that he answer over. In complying with this order, it is not perceived how a party can be said to abandon his plea, or waive his right to a correct decision upon his plea. The Court was doubtless led into this error by supposing that the defendant below stood upon the same ground as a party who, after his plea had been held bad on demurrer, asks and obtains leave of the Court to amend his plea. In this case, the plea is considered as abandoned. So, if a party demurs to a pleading, and the demurrer is overruled, and he obtains leave to withdraw his demurrer and plead or reply, the demurrer is deemed to be waived. In both of these cases, it is considered the act of the party that produces the result. He admits that he was wrong, and he should not be permitted subsequently to come into Court and insist that he was right. In the case at bar, however, there is no such admission. Consequently, if the Court decided the defendant's plea in abatement to be insufficient, when, by law, it should have been sustained, he has a right to have that decision reviewed on a writ of error."

And so in Grand Lodge v. Cramer, 164 Ill. 9; Gardner v. James, 5 R. I. 235.

In Pepper v. Whalley, 5 Nev. & Man. 437 (1835), after judgment of *respondeat ouster* on demurrer to a plea in abatement, the defendant pleaded in bar, and on the issue there was a verdict for plaintiff. Defendant moved in arrest because the plea, demurrer, etc., were omitted from the *nisi prius* record. The Court held the omission proper under the Hilary rules, thus changing the former practice. The Reporter added the following note: "Unless the plea in abatement, the demurrer thereto, and the joinder in demurrer and the judgment of *respondeat ouster*, appeared on the judgment roll, the defendant would have no opportunity of insisting, before a Court of Error, upon the sufficiency of the plea in abatement. Quaere, as to the mode of effecting this since the new rules." The judgment of *respondeat ouster* was interlocutory so that a writ of error would not lie directly. Tidd's Practice, 8th Eng. ed. p. 1195.

ABBOTT v. SEMPLE.

25 Illinois, 91. [*1860.*]

Mr. Justice BREESE delivered the opinion of the court.

The first point made in this case, that of the legality of the special October term, has been already settled in the case of Mattingly v. Darwin, 23 Ill. 618. We there held that such appointment of a special term was regular and in conformity with the statute.

It is, however, contended here, that admitting the legality of the special term, yet one of the defendants, Lemon, was not summoned at all, the process as to him having been returned not found. We have often said service of process is unnecessary, if the party appears, appearance being the object of process. When that is effected without service, as by a regular entry of appearance in person, or by attorney, the law is satisfied.

This record shows that both defendants appeared by their attorneys, and joined in a motion to quash the summons; and, after that was disposed of, the record shows they again appeared and entered their motion for a new trial, and that they also appeared to except to the ruling of the court directing the order appointing the special term to be entered on the record; and also appeared and entered their motion to dismiss the case for want of jurisdiction of the persons of the defendants, they not having been summoned to appear at the special October term. It was at no time objected by the defendant Lemon, that he was not served at all, but with his co-defendant Abbott, who was served, joined in the motions that were made. Under these circumstances we must hold that there was a general appearance of both these defendants for all purposes. Frazier v. Resor, 23 Ill. 88.

When a party only appears for the purpose of showing he is not properly before the court, he should so confine it in his motion, else he may be adjudged to have appeared for all purposes—that his appearance, not being limited to a specific purpose, will be held to be a general appearance.

Judgment affirmed.

HURLBURT v. PALMER.

39 Nebraska, 158. [*1894.*]

In this action under the Nebraska Code, the defendant had filed an answer uniting a plea to the merits with a plea to the jurisdiction on the ground of abuse of criminal process by which service was obtained. The trial court excluded proof of this latter defense on the ground that the answer to the merits amounted to a waiver.[1]

RYAN, C. (after stating the case in detail). * * * These facts present for our determination the question whether or not by answering as one defense by way of a general denial (modified perhaps by an admission), the defendant of necessity waived his right to plead as a separate defense such facts as would show that jurisdiction of the person of the defendant had been obtained, if at all, by fraud and abuse of the process of the court—the facts above offered to be proved leaving no room for a milder statement as to the propositions in support of which proof was tendered. It is greatly to be regretted that the adjudications of this court upon the proposition stated furnish apparent authority for the contention of each party. * * *

The misapprehension of the scope of former decisions of this court as justifying an inference of waiver as to the question of jurisdiction, by pleading the facts defeating it in connection with other matters of defense by way of answer, required the review by this court of its former opinions on that subject, and having found that this court had not gone to the extreme assumed, it was deemed but proper to notice the holdings of other courts upon the same subject. Our conclusion is, that under section 99 of the Code of Civil Procedure it is proper to plead as a distinct defense such facts as do not appear in the record, whereby it is made known that the court has no jurisdiction either of the person or the subject-matter of the action. As an original question it would seem that there should have been no doubt as to this proposition, for it is provided in section 94 of the Code of Civil Procedure, among other provisions, that "the defendant may demur to the petition only when it appears on its face either,

[1] Statement has been condensed. —Ed.

first, that the court has no jurisdiction of the person of the defendant or the subject of the action," etc. In the same Code it is provided as follows by section 96: "When any of the defects enumerated in section 94 do not appear upon the face of the petition, the objection may be taken by answer, and if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same," etc. By this section it is expressly provided that the failure to make objection by answer, where the defect does not appear upon the face of the petition, shall be deemed a waiver of such defect; that is to say, the failure to raise by answer the question of jurisdiction, arising as it did in this case, must be deemed a waiver of all objections on that score. It is a harsh and unnatural construction, and one in direct contravention of the provisions of this section, to hold that by taking objections to jurisdiction in the manner provided thereby, the defendant waives the very objections he shall be deemed to have waived unless he proceeds in that very manner. In view of all the considerations to which attention has been challenged, we conclude that the District Court erred in sustaining the objections made to the evidence offered for the purpose of showing that the court had no jurisdiction of the persons of the plaintiffs in error.[2]

GRANTIER v. ROSECRANCE.

27 Wisconsin, 488. [*1871.*]

Appeal from an order setting aside a judgment by default and vacating the service.

COLE, J. There can be no doubt that the record failed to show any legal service of the summons in the action; and had not this defect been waived by the appearance of the defendant Rose-

[2] Accord: Allen v. Miller, 11 Ohio St. 374; Hapgood v. Dial, 43 Tex. 625; Telephone Co. v. Beeler, 125 Ky. 366; Johnson v. Detrick, 152 Mo. 243. But see Corbett v. Casualty Co., 135 Wis. 505.

In Missouri, a plea to the jurisdiction may be joined with a plea in bar, but the objection to jurisdiction of the person will be waived, if it should have been taken by motion instead of plea. Newcomb v. Ry., 182 Mo. 687.

crance, the order appealed from would have to be affirmed. But he, by his attorneys, moved the court to set aside the judgment upon several grounds, one of which was the following: "4th. Because the complaint in this action does not state a cause of action against the defendant Martin Rosecrance." Coming into court and moving that the judgment be set aside upon such a ground was a general appearance in the cause, and cured all irregularity in the service of process. It is true the notice states that the defendant appears "specially" for the purpose of setting aside the judgment; and had he limited the motion solely to the defects in the service of the summons, the appearance would have been a qualified one. But he did not ask to have the judgment vacated for that reason alone, but because the complaint did not state a cause of action against him. This was a full submission to the jurisdiction of the court, and was a general appearance. It is substantially the same as though he had come into court before judgment was entered, and demurred to the complaint upon the ground that it stated no cause of action. He expressly asked the court, in his motion, to review the complaint, and to vacate the judgment because the complaint was fatally defective. It is difficult to conceive how a more full or general appearance could be made, so far as the jurisdiction over the person of the defendant Rosecrance was concerned. He must be held to have waived all defects and irregularities in the service of the summons upon him. Stonach v. Glessner, 4 Wis. 275; Barnum v. Fitzpatrick, 11 id. 81; Tallman v. McCarthy, id. 401; Upper Transportation Co. v. Whittaker, 16 id. 220; Conger v. C. & G. U. R. R., 17 id. 477; Cron v. Krones, id. 401.

By the Court: The order of the Circuit Court is reversed, and the cause remanded with directions to reinstate the judgment.[1]

McARTHUR v. LEFFLER.

110 Indiana, 526. [*1886.*]

In the original action of Leffler v. McArthur,[2] there was a return of *non est*, and an affidavit for an order of publication, at

[1] But see Godfrey v. Valentine, 39 Minn. 36; Jones v. Bird, 74 Ill. 115.

[2] Statement has been condensed.

which stage of the proceedings the attorneys for McArthur filed a demurrer to the complaint and obtained a change of venue to Pulaski County; the latter court granted leave to withdraw the appearance and demurrer, and thereafter judgment by default was entered. McArthur then brought the present suit under the Indiana statute to review the default judgment. A demurrer was sustained to the complaint and the plaintiff appealed.

HOWK, J. Did the court err in sustaining appellee's demurrer to appellant's complaint for review, the substance of which we have given? We are of opinion that this question ought to be, and must be, answered in the affirmative. It may be conceded that, upon the facts stated in such complaint, if the appellee had objected to the withdrawal of appellant's appearance in the original action, it would have been error to have overruled such objection, and to have permitted such appearance to be withdrawn. Indeed, upon the facts stated, it would have been competent for the court in its own discretion, without any objection on the part of the appellee, to have denied the leave requested for the withdrawal of appellant's appearance.

Thus, in Young v. Dickey, 63 Ind. 31, the court said: "Perhaps, when a defendant appears to an action without process and service, the court would not allow him to withdraw his appearance over the objection of the plaintiff, or, at least, in such a case, it would be within the judicial discretion of the court to allow, or not to allow, his withdrawal, according to the merits of the question." New Albany, etc., R. R. Co. v. Combs, 13 Ind. 490.

"According to the merits of the question," as presented by the facts stated in appellant's complaint in the case under consideration, we think the court below would have been fully authorized in the exercise of its discretion, with or without objection on the part of the appellee, to refuse to allow the withdrawal of appellant's appearance. For it was clearly shown by the averments of his complaint that the appellant, by his counsel, not only appeared fully to the original action and filed his demurrer to the complaint therein, in the Starke Circuit Court, but that he there applied for and obtained, upon the affidavit of one of his counsel, a change of venue to the Pulaski Circuit Court.

Upon this state of the record, it seems to us that the court below, except for good cause shown, ought to have promptly denied or overruled the motion of appellant's counsel for leave to withdraw their appearance for him. But the court sustained

the motion of counsel, and allowed them to withdraw not only their appearance for appellant, but also his demurrer to the complaint and his other papers, in the original cause. It is shown by the averments of appellant's complaint herein, admitted to be true by appellee's demurrer thereto, that the court below, two days after the withdrawal of appellant's appearance and papers, attempted to amend its previous orders so as to show that the leave to withdraw appearance was granted, but that the leave to withdraw demurrer and other papers was denied. But this attempted amendment did not change the previous order, in legal effect.

It has always been held by this court that the withdrawal of a defendant's appearance in a cause, of itself, effects the withdrawal of all his pleadings therein. Thus, in the early case of Carver v. Williams, 10 Ind. 267, the court said: "If a party appears to a suit and pleads, and then simply fails to appear at the trial, his pleadings stand. But if, after pleading, he comes and withdraws his appearance to the suit, which, by leave of the court, he may do, his pleadings go with his appearance." What was there said has been quoted with approval and followed in many of our subsequent decisions. Sloan v. Wittbank, 12 Ind. 444; Smith v. Foster, 59 Ind. 595; Young v. Dickey, supra; Gunel v. Cue, 72 Ind. 34; Love v. Hall, 76 Ind. 326.

Appellant's appearance to appellee's action having been withdrawn, with leave of the court first had, and it not appearing that he had afterwards appeared therein either in person or by attorney, of course it was not competent for either the court or the appellee to take any further proceedings against appellant in such cause, until after proof had been duly made of the issue and service on him of process issued therein. No such proof of the issue and service of process was made, or attempted to be made in the original cause, and, therefore, the court below clearly erred in calling and defaulting appellant therein, and in rendering judgment against him upon such default. Thus, in Dunkle v. Elston, 71 Ind. 585, which, like the case we are now considering, was a suit for the review of a judgment for errors of law apparent in the record, the court said: "The withdrawal of appearance for the defendants by * * * their attorneys, took with it the answers of the defendants. Young v. Dickey, 63 Ind. 31. And a judgment by default was therefore proper, if the defendants had been duly served with process."

In the case at bar, as we have seen, one of the errors of law apparent in the record of the judgment sought to be reviewed was that appellant had not been duly served with process in the original cause, and from this error of law it followed of necessity that the judgment by default against him therein was improper, erroneous, and wholly unauthorized by law.

We are of opinion, therefore, that the court clearly erred in sustaining appellee's demurrer to appellant's complaint herein for the review and reversal of the judgment against him described therein.

The judgment is reversed with costs, and the cause is remanded, with instructions to overrule the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.[1]

(d) *The service required in various actions.*

BECQUET v. MACCARTHY.

2 Barnewall & Adolphus. 951. [*1831.*]

LORD TENTERDEN, C. J., now delivered the judgment of the court.

This was an action brought upon a judgment recovered in the Island of Mauritius. That island, at the time of the suit in

[1] Accord: Graham v. Spence, 14 Fed. 603. But see Dart v. Hercules, 34 Ill. 395, in which Walker, C. J., said: "The only purpose of original process is to bring parties into court. And when the defendant enters his appearance, the object is accomplished, and it is not material whether the summons issued in the case was defective or not, or even whether it is ever issued. By an appearance to the action, the court acquires jurisdiction of the person of defendant as fully as it can be had by summons, with proper service. When he appears in the case it is an admission that he has been duly served, or that he waives service; and all the proceedings of the court in the case are as valid and binding as if the process was regular and the service unobjectionable. By filing a plea in bar a full appearance was entered, which was not withdrawn by withdrawing the plea. After it was withdrawn, the appearance still remaining, plaintiff below was entitled to judgment *nil dicit*, at any time before another plea was filed."

And so in Eldred v. Bank, 17 Wall. 545; Creighton v. Kerr, 87 U. S. 8. Where the appearance of a non-resident has been entered without authority, that fact may be set up as a defense to the judgment. Sheldon v. Griffin, 6 How. (U. S.) 162.

which the judgment was given, belonged to the sovereign of this country, but the French law then prevailed there. The judgment was recovered by a person whose premises had been destroyed by fire which began in the premises belonging to or occupied by the testator, at that time deputy paymaster of the forces in the island. Among other objections taken to the validity of this judgment, one was, that supposing the court to have proceeded upon the article 1384 of the Code Civil, and taking it for granted that the fire originated in premises occupied by the testator, still that was not sufficient to make him liable, because the fire might have begun without the fault of the testator or any of his servants. The law of France being the law of the colony at the time when the judgment was pronounced, the French court was much more competent to decide questions arising upon that law than we can be. * * *

Another objection, and not an unimportant one, was, that the testator, when the proceedings were instituted against him, was absent from the island; and it was urged, that it was contrary to the principles of natural justice that any one should be condemned unheard, and in his absence. Proof. however, was given that by the law of the colony, in the case of a person formerly resident in the island, absenting himself, and not leaving any attorney upon whom process in a suit might be served, the procurator-general or his deputy was bound to take care of the interests of such absent party. It was said that the law of the island did not provide any means whereby the procurator-general or his deputy might be required to hold communication with, or receive directions from an absent person. There may, perhaps, be some deficiency in the law in that respect; but as the law of the island is, that the process shall be served upon the public officer, it must be presumed that he would do whatever was necessary in the discharge of that public duty; and we cannot take upon ourselves to say that the law is so contrary to natural justice as to render the judgment void in a case where the process was so served.[1] For these reasons we are of opinion, that the rule for a new trial should be discharged.

Rule discharged.

[1] In Sirdar Gurdial Singh v. Rajah of Faridkote, (1894) App. Cases, 670 the Privy Council refused to extend the rule to the case of a foreigner who had returned to his home state before action brought.

SMITH v. GRADY.

68 Wisconsin, 215. [*1887.*]

Appeals from the Circuit Court for Chippewa County.

The plaintiff duly presented to the Chippewa County Court for allowance their verified claim against the estate of Patrick O'Donnel, the defendant's testator, founded upon a judgment recovered by them in the County Court of the county of Peterborough, in the Province of Ontario and Dominion of Canada, against the testator in his lifetime. The Chippewa County Court disallowed the claim, whereupon the plaintiffs appealed to the Circuit Court. The Circuit Court also disallowed it, and from the judgment of disallowance the plaintiffs have appealed to this court.

A duly exemplified copy of the judgment roll in the Ontario court, including the judgment, was offered in evidence by the plaintiffs, from which it appears that the action, which was commenced by a writ of summons, was a personal action against the defendant for services as solicitors alleged to have been rendered him in Ontario by the plaintiffs; that the only service of such process upon the testator was made upon him personally in the county of Chippewa in this state, and that he made no appearance in the action. It also sufficiently appears, by a stipulation of facts made in the case and otherwise, that the testator resided in Ontario and was a subject of Great Britain when he became indebted to the plaintiffs; that he continued such subject until his death; that he was not a resident of Ontario and had no property therein when process was served upon him, or afterwards; that all the proceedings in the Ontario action, including the service of process in this state are regular under the laws of Ontario, and that the judgment is authorized by such laws; also that the Peterborough County Court is a court of record having jurisdiction of such actions. * * *

LYON, J. The only question which the first appeal herein presents for determination is, Did the service of process in this state upon Patrick O'Donnel, the defendant's testator, give the Ontario court jurisdiction of his person, so as to make valid its personal judgment against him, based entirely upon such service? Whatever validity such judgment may have in Ontario or Canada under the laws of that province or dominion, in this

country the authorities are very uniform that a personal judgment, founded alone upon service of process in another state or foreign country, is void. Many of the cases which so hold are cited in the brief of counsel for the defendant. Of these McEwan v. Zimmer, 38 Mich. 765, is worthy of special notice. See also Bischoff v. Wethered, 9 Wall. 812.

But it is not necessary to look elsewhere for doctrine or authority on this question, for this court ruled upon the subject many years ago in Jarvis v. Barrett, 14 Wis. 591. The question was there settled and further discussion of it foreclosed in the following terms: "It is a universally acknowledged principle that jurisdiction cannot be acquired or exercised over persons or property without the territorial limits of the government where the court sits, and that the legislature possesses no power to grant it. It can only be obtained of persons and property within the territory so as to be subjected to the process of the court. Jurisdiction of a defendant cannot be acquired so as to bind him personally, except by his voluntary appearance, or by due service of process within the state, and service out of the state is utterly nugatory and void for that purpose."[1]

The claim against the estate of the testator being upon the void judgment alone, it was properly disallowed both by the county and circuit courts.

By the court. The judgment of the Circuit Court is affirmed.

* * *

GOLDEY v. MORNING NEWS.

156 United States, 518. [*1894.*]

This was an action for a libel, claiming damages in the sum of $100,000 brought in the Supreme Court of the State of New York for the county of Kings, by Catherine Goldey, a citizen of the State of New York, against the Morning News of New Haven, a corporation organized and existing under the laws of the State of Connecticut, and carrying on business in that state

[1] Accord: Grabel v. Massauer, 210 N. Y. 149 (notice by publication).

only, and having no place of business, officer, agent or property in the State of New York.

The action was commenced January 4, 1890, by personal service of the summons in the city and State of New York upon the president of the corporation, temporarily there, but a citizen and resident of the State of Connecticut; and on January 24, 1890, upon the petition of the defendant, appearing by its attorney specially and for the sole and single purpose of presenting the petition for removal, was removed into the Circuit Court of the United States for the Eastern District of New York, because the parties were citizens of different states, and the time within which the defendant was required by the laws of the State of New York to answer or plead to the complaint had not expired.

In the Circuit Court of the United States, the defendant, on February 5, 1890, appearing by its attorney specially for the purpose of applying for an order setting aside the summons and the service thereof, filed a motion, supported by affidavits of its president and of its attorney to the facts above stated, to set aside the summons and the service thereof, upon the ground "that the said defendant, being a corporation organized under the laws of the State of Connecticut, where it solely carries on its business, and transacting no business within the State of New York, nor having any agent clothed with authority to represent it in the State of New York, cannot legally be made a defendant in an action by a service upon one of its officers while temporarily in said State of New York." Thereupon that court, after hearing the parties on a rule to show cause why the motion should not be granted, "ordered that the service of the summons herein be, and the same is hereby, set aside and the same declared to be null and void and of no effect, and the defendant is hereby relieved from appearing to plead in answer to the complaint or otherwise herein." 42 Fed. Rep. 112. The plaintiff sued out this writ of error.[1]

Mr. Justice GRAY, after stating the case, delivered the opinion of the court.

This writ of error presents the question whether, in a personal action against a corporation which neither is incorporated nor does business within the state, nor has any agent or property

[1] For that part of the opinion dealing with the question of special appearance, see *ante* p. 93.

therein, service of the summons upon its president, temporarily within the jurisdiction, is sufficient service upon the corporation.

The defendant in error has interposed a preliminary objection that the judgment of the Circuit Court upon this question cannot be reviewed, because of the provision of the statutes, that there shall be no reversal in this court upon a writ of error "for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court." Rev. Stat. § 1011, as amended by Act of February 18, 1875, ch. 80, 18 Stat. 318. But that provision, which has been part of the judiciary acts of the United States from the beginning, has never been, and in our opinion should not be, construed as forbidding the review of a decision, even on a plea in abatement, of any question of the jurisdiction of the court below to render judgment against the defendant, though depending on the sufficiency of the service of the writ. Act of September 24, 1789, c. 20, § 22, 1 Stat. 85; Pollard v. Dwight, 4 Cranch, 421; Harkness v. Hyde, 98 U. S. 476; Mexican Central Railway v. Pinkney, 149 U. S. 194.

Upon the question of the validity of such a service as was made in this case, there has been a difference of opinion between the courts of the State of New York and the Circuit Courts of the United States. Such a service has been held valid by the Court of Appeals of New York. Hiller v. Burlington & Missouri Railroad, 70 N. Y. 223; Pope v. Terre Haute Co., 87 N. Y. 137. It has been held invalid by the Circuit Court of the United States held within the State of New York: Good Hope Co. v. Railway Barb Fenceing Co., 23 Blatchford, 43; Goldey v. Morning News, 42 Fed. Rep. 112; Clews v. Woodstock Co., 44 Fed. Rep. 31; Bentlif v. London & Colonial Corporation, 44 Fed. Rep. 667; American Wooden Ware Co. v. Stem, 63 Fed. Rep. 676; as well as in other circuits. Elgin Co. v. Atchison, etc., Railway, 24 Fed. Rep. 866; United States v. American Bell Tel. Co., 29 Fed. Rep. 17; Carpenter v. Westinghouse Co., 32 Fed. Rep. 434; St. Louis Co. v. Consolidated Barb Wire Co., 32 Fed. Rep. 802; Reifsnider v. American Publishing Co., 45 Fed. Rep. 433; Fidelity Co. v. Mobile Railway, 53 Fed. Rep. 850. It becomes necessary, therefore, to consider the question upon principle, and in the light of the previous decisions of this court.

It is an elementary principle of jurisprudence, that a court of justice cannot acquire jurisdiction over the person of one who

has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service. Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government. D'Arcy v. Ketchum, 11 How. 165; Knowles v. Gaslight Co., 19 Wall. 58; Hall v. Lanning, 91 U. S. 160; Pennoyer v. Neff, 95 U. S. 714; York v. Texas, 137 U. S. 15; Wilson v. Seligman, 144 U. S. 41.

For example, under the provisions of the Constitution of the United States and of the acts of Congress, by which judgments of the courts of one state are to be given full faith and credit in the courts of another state, or of the United States, such a judgment is not entitled to any force or effect, unless the defendant was duly served with notice of the action in which the judgment was rendered, or waived the want of such notice. Constitution, art. 4, § 1; Acts of May 26, 1790, c. 11, 1 Stat. 122, and March 27, 1804, c. 56, 2 Stat. 299, Rev. Stat. § 905; Knowles v. Gaslight Co., and Pennoyer v. Neff, above cited.

* * * So a judgment rendered in a court of one state against a corporation neither incorporated nor doing business within the state must be regarded as of no validity in the courts of another state or of the United States, unless service of process was made in the first state upon an agent appointed to act there for the corporation, and not merely upon an officer or agent residing in another state, and only casually within the state, and not charged with any business of the corporation there. Lafayette Ins. Co. v. French, 18 How. 404; St. Clair v. Cox, 106 U. S. 350, 357, 359; Fitzgerald Co. v. Fitzgerald, 137 U. S. 98, 106; Mexican Central Railway v. Pinkney, 149 U. S. 194; In re Hohorst, 150 U. S. 653, 663.

The principle which governs the effect of judgments of one state in the courts of another state is equally applicable in the Circuit Courts of the United States, although sitting in the state in which the judgment was rendered. In either case, the court the service of whose process is in question, and the court in which the effect of that service is to be determined, derive their jurisdiction and authority from different governments. Pennoyer v. Neff, 95 U. S. 714, 732, 733.

For the same reason, service of *mesne* process from a court of

a state, not made upon the defendant or his authorized agent within the state, although there made in some other manner recognized as valid by its legislative acts and judicial decisions, can be allowed no validity in the Circuit Court of the United States after the removal of the case into that court, pursuant to the acts of Congress, unless the defendant can be held, by virtue of a general appearance or otherwise, to have waived the defect in the service, and to have submitted himself to the jurisdiction of the court.[2]

DILLON v. HELLER.

39 Kansas, 599. [*1888.*]

Plaintiff brought suit under the code against the defendant, a non-resident, to quiet title to a tract of land, and obtained service by publication. The defendant entered a special appearance and moved to quash for lack of jurisdiction. This motion was overruled and judgment entered by default. The defendant sued out the present writ of error.[1]

VALENTINE, J. The plaintiff in error, who was defendant below, claims that the court below erred in the following particulars and for the following reasons, to-wit:

"1. That service of summons by publication in actions to 'quiet title' is not sufficient to give the court jurisdiction of the party defendant.

"2. That the court, not having jurisdiction of the party defendant, cannot pronounce judgment in the matter.

"3. That the service by publication is null and void and of no effect because it does not run in the name or style of 'The state of Kansas.'

"4. That the service by publication is null and void for the reason that it is not dated of the day and date issued.

"5. That the affidavit to secure service by publication is wholly insufficient to base a service by publication upon.

[2] See also Latimer v. Ry., 43 Mo. 105 (suit on a judgment rendered in N. Y. on the same state of facts). For the contrary view, see Pope v. Mfg. Co., 87 N. Y. 137.

[1] Statement has been condensed.

"6. That the judgment is void and null for the reason that it was obtained without any evidence whatever."

While the plaintiff in error does not in terms claim that a court cannot in any case where the defendant is a non-resident and out of the state, obtain jurisdiction to hear and determine the case by virtue of a service of summons only by publication, yet such is the result of his argument; and in support of such argument he cites a number of authorities, the principal of which is the case of Hart v. Sansom, 110 U. S. 151. We do not think, however, that the authorities cited go to the extent claimed for them. Of course a court cannot obtain jurisdiction of the person of a non-resident defendant by means only of a service of summons by publication, nor can the court obtain jurisdiction of the person of any person who is a non-resident and out of the state, by any kind of service, or by any kind of process or notice; for the jurisdiction of the courts of any sovereignty can never extend beyond the domain of the sovereignty which creates them. (Amsbaugh v. Exchange Bank, 33 Kans. 100, 105.) No court in Kansas can compel a non-resident defendant out of the state to come within its territorial boundaries, or to submit himself to its jurisdiction, or to do or perform any other act or thing; but this lack of power on the part of the court does not depend upon the character of the service of process made upon the defendant, but it arises from the well-established doctrine that the jurisdiction of one sovereignty (through its courts or otherwise) cannot extend into the territorial boundaries of another sovereignty. Therefore, for the purposes of this case, it will be admitted that the court below did not have jurisdiction of the person of the defendant below, plaintiff in error. But that does not settle this controversy. The court below had jurisdiction of something. It had jurisdiction of the plaintiff below, and it had jurisdiction of the subject-matter of the action. This latter proposition, however, is questioned. Jurisdiction is of two kinds: jurisdiction of the person, and jurisdiction of the property or thing in controversy; or, in other words, jurisdiction *in personam*, and jurisdiction *in rem;* and jurisdiction in either case is sufficient to authorize a valid judgment to be rendered. Now it may be admitted, for the purposes of this case, and is admitted, that the old equitable action to quiet title to real estate was purely an action *in personam;* and indeed it will be admitted that originally every action in equity was purely an action *in personam*,

but such is not the case under the statutes of this state, and such is not the case with respect to the present action. The present action is purely a statutory action brought by the plaintiff under § 594 of the Civil Code, and is one of a kind of actions which can be maintained only by a person who is in the actual possession of the property in controversy, either by himself or tenant. Where personal service of summons can be obtained in such an action the action is one *in personam* as well as *in rem*, but where service of summons can be had only by publication, then the action is one only *in rem*. The present action is one only *in rem;* and the court below had ample jurisdiction to hear and determine the same. For the present, we shall assume that the statutes authorizing service of summons by publication were strictly complied with in the present case, and then the only question to be considered is whether the statutes themselves are valid; or, in other words, we think the question is this: Has the state any power through the legislature and the courts, or by any other means or instrumentalities, to dispose of or control property in the state belonging to non-resident owners out of the state, where such non-resident owners will not voluntarily surrender jurisdiction of their persons to the state, or to the courts of the state, and where the most urgent public policy and justice require that the state and its courts should assume jurisdiction over such property. Power of this kind has always been exercised, not only in Kansas, but in all the other states. Lands of non-resident owners, as well as of resident owners, are taxed and sold for the taxes; and the owners may thereby be totally deprived of such lands, although no notice is ever given to such owners except a notice by publication or some other notice of no greater value, force, or efficacy. (Beebe v. Doster, 36 Kans. 666, 675-677.) Mortgage liens, mechanic's liens, material men's liens, and other liens are foreclosed against non-resident defendants upon service by publication only. Lands of non-resident defendants are attached and sold to pay their debts; and indeed almost any kind of action may be instituted and maintained against non-residents to the extent of any interest in property which they may have in Kansas, and the jurisdiction to hear and determine in this kind of cases may be obtained wholly and entirely by publication. (Gillespie v. Thomas, 23 Kans. 138; Walkenhorst v. Lewis, 24 id. 420; Rowe v. Parmer, 29 id. 337; Venable v. Dutch, 37 id. 515, 519.) All the states, by proper statutes, au-

thorize actions against non-residents, and service of summons therein by publication only, or service in some other form no better; and in the nature of things such must be done in every jurisdiction, in order that full and complete justice may be done where some of the parties are non-residents. We think a sovereign state has the power to do just such a thing. All things within the territorial boundaries of a sovereignty are within its jurisdiction; and generally, within its own boundaries, a sovereignty is supreme. Kansas is supreme except so far as its powers and authority are limited by the constitution and the laws of the United States. And within the constitution and the laws of the United States the courts of Kansas may have all the jurisdiction over all persons and things within the state, which the constitution and laws of Kansas may give to them, and the mode of obtaining this jurisdiction may be prescribed wholly, entirely and exclusively by the statutes of Kansas. To obtain jurisdiction of anything within the state of Kansas, the statutes of Kansas may make service by publication as good as any other kind of service. In the present case the plaintiff resides within the state of Kansas, and he virtually surrendered jurisdiction of himself to the court below when he commenced this action. He is in the actual possession of the property in controversy and, being in the actual possession thereof, he also in effect surrendered jurisdiction thereof to the court when he brought this action, and as much jurisdiction thereof as any court in any action could obtain by virtue of a seizure of the property by its own officers; and service of summons by publication, as authorized by law, was afterward had in this case; and this gave the court the power to hear and determine the case, and to render judgment therein, and to enforce such judgment; and this is all that is necessary to give complete and absolute jurisdiction over the thing in controversy. Jurisdiction is simply the power to hear and determine and to enforce the judgment, order or decree made or rendered on such hearing. Nothing can be lacking in the present case. The court had the power to hear and determine the case, the power to render the judgment prayed for, which was to quiet the plaintiff's title and possession; and he was in the actual possession of the property; and as the property was and is within the territorial jurisdiction of the court, there would seem to be no good reason why the judgment is not valid, and why the court cannot enforce such judgment. It is said in the case of Hart v.

Sansom, 110 U. S. 155, that "the courts of the state may perhaps feel bound to give effect to the service made as directed by its statutes," and also: "It would doubtless be within the power of the state in which the land lies to provide by statute that if the defendant is not found within the jurisdiction, or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose." Now certainly no court would feel bound to give effect to a statute unless the court believed the statute to be valid and an existing law, and if the state may rightfully provide by statute that any one of its courts may authorize a trustee to make or cancel a deed executed by or for a non-resident, or in which a non-resident is interested, then the state could unquestionably authorize the same court by its judgment alone, to cancel or in effect to create the deed, for the trustee appointed by the court is the mere creature of the court and can take no power nor exercise any power except such as emanates from the court itself. There can certainly be no necessity for the circuitous, indirect and cumbrous mode of appointing a trustee to do a thing, when the judgment of the court may itself answer the entire purpose. (See Civil Code, § 400.) If jurisdiction cannot be given to the court to render such a judgment, then, *a fortiori*, jurisdiction could not be given to the court to appoint a trustee for such a purpose. A court without jurisdiction cannot do anything—not even to appoint a trustee. We think the court below had ample jurisdiction in the present case. We think a court may in any case, where the statutes authorize the same, obtain jurisdiction upon service by publication concerning anything present and existing within the boundaries of the state. To hold otherwise would unsettle and overturn a great many titles to land in this state—titles which have long been acquiesced in and supposed to be good and valid, and to be settled and established by the statutes and by numerous judicial decisions. And to hold otherwise would also do great injustice to innocent purchasers of lands hold the same under such titles. We think such titles are good.[2]

[2] Accord: Hildrith v. Oil Cloth Co., 112 U. S. 294; Arndt v. Griggs, 134 U. S. 316.

As to when service by publication is due process, see Jacob v. Roberts, 223 U. S. 261.

PENNOYER v. NEFF.

95 United States, 714. [*1877.*]

Mr. Justice FIELD delivered the opinion of the court.[1]

This is an action to recover the possession of a tract of land of the alleged value of $15,000, situated in the State of Oregon. The plaintiff asserts title to the premises by a patent of the United States issued to him in 1866, under the act of Congress of September 27, 1850, usually known as the Donation Law of Oregon. The defendant claims to have acquired the premises under a sheriff's deed, made upon a sale of the property on execution issued upon a judgment recovered against the plaintiff in one of the Circuit Courts of the state. The case turns upon the validity of this judgment.

It appears from the record that the judgment was rendered in February, 1866, in favor of J. H. Mitchell, for less than $300, including costs, in an action brought by him upon a demand for services as an attorney; that, at the time the action was commenced and the judgment rendered, the defendant therein, the plaintiff here, was a non-resident of the state; that he was not personally served with process, and did not appear therein; and that the judgment was entered upon his default in not answering the complaint, upon a constructive service of summons by publication.

The Code of Oregon provides for such service when an action is brought against a non-resident and absent defendant, who has property within the state. It also provides, where the action is for the recovery of money or damages, for the attachment of the property of the non-resident. And it also declares that no natural person is subject to the jurisdiction of a court of the state, "unless he appear in the court, or be found within the state, or be a resident thereof, or have property therein; and, in the last case, only to the extent of such property at the time the jurisdiction attached." Construing this latter provision to mean that, in action for money or damages where a defendant does not appear in the court, and is not found within the state, and is not a resident thereof, but has property therein, the juris-

[1] The length of this case made it necessary to omit the dissenting opinion and parts of the principal opinion.

diction of the court extends only over such property, the declaration expresses a principle of general, if not universal law. The authority of every tribunal is necessarily restricted by the territorial limits of the state in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse. D'Arcy v. Ketchum et al., 11 How. 165. In the case against the plaintiff, the property here in controversy sold under the judgment rendered was not attached, nor in any way brought under the jurisdiction of the court. Its first connection with the case was caused by a levy of the execution. It was not, therefore, disposed of pursuant to any adjudication, but only in enforcement of a personal judgment, having no relation to the property, rendered against a non-resident without service of process upon him in the action, or his appearance therein. The court below did not consider that an attachment of the property was essential to its jurisdiction or to the validity of the sale, but held that the judgment was invalid from defects in the affidavit upon which the order of publication was obtained, and in the affidavit by which the publication was proved.

There is some difference of opinion among the members of this court as to the rulings upon these alleged defects. The majority are of opinion that inasmuch as the statute requires, for an order of publication, that certain facts shall appear by affidavit to the satisfaction of the court or judge, defects in such affidavit can only be taken advantage of on appeal, or by some other direct proceeding, and cannot be urged to impeach the judgment collaterally. * * *

If, therefore, we were confined to the rulings of the court below upon the defects in the affidavits mentioned, we should be unable to uphold its decision. But it was also contended in that court, and is insisted upon here, that the judgment in the state court against the plaintiff was void for want of personal service of process on him, or of his appearance in the action in which it was rendered, and that the premises in controversy could not be subjected to the payment of the demand of a resident creditor except by a proceeding *in rem;* that is, by a direct proceeding against the property for that purpose. If these positions are sound, the ruling of the Circuit Court as to the invalidity of that judgment must be sustained, notwithstanding our dissent from

the reasons upon which it was made. And that they are sound would seem to follow from two well-established principles of public law respecting the jurisdiction of an independent state over persons and property. The several states of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent states, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every state has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred. The other principle of public law referred to follows from the one mentioned; that is, that no state can exercise direct jurisdiction and authority over persons or property without its territory. Story, Confl. Laws, c. 2; Wheat. Int. Law, pt. 2, c. 2. The several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one state have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. "Any exertion of authority of this sort beyond this limit," says Story, "is a mere nullity, and incapable of binding such persons or property in any other tribunals." Story, Confl. Laws, § 539.

But as contracts made in one state may be enforceable only in another state, and property may be held by non-residents, the exercise of the jurisdiction which every state is admitted to possess over persons and property within its own territory will often affect persons and property without it. To any influence exerted in this way by a state affecting persons resident or prop-

erty situated elsewhere, no objection can be justly taken; whilst any direct exertion of authority upon them, in an attempt to give ex-territorial operation to its laws, or to enforce an ex-territorial jurisdiction by its tribunals, would be deemed an encroachment upon the independence of the state in which the persons are domiciled or the property is situated, and be resisted as usurpation.

Thus the state, through its tribunals, may compel persons domiciled within its limits to execute, in pursuance of their contracts respecting property elsewhere situated, instruments in such form and with such solemnities as to transfer the title, so far as such formalities can be complied with; and the exercise of this jurisdiction in no manner interferes with the supreme control over the property by the state within which it is situated. Penn. v. Lord Baltimore, 1 Ves. 444; Massie v. Watts, 6 Cranch, 148; Watkins v. Holman, 16 Pet. 25; Corbett v. Nutt, 10 Wall. 464.

So the state, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the state where the owners are domiciled. Every state owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the state's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-resident have no property in the state, there is nothing upon which the tribunals can adjudicate. * * * [The opinion here reviews Picquet v. Swan, 5 Mass. 35, Boswell v. Otis, 9 How. 336, Cooper v. Reynolds, 10 Wall. 308, and then proceeds:] If, without personal service, judgments *in personam*, obtained *ex parte* against non-residents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression. Judgments for all sorts of claims upon contracts and for torts, real or pretended, would be thus obtained,

under which property would be seized, when the evidence of the transactions upon which they were founded, if they ever had any existence, had perished.

Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability.

The want of authority of the tribunals of a state to adjudicate upon the obligations of non-residents, where they have no property within its limits, is not denied by the court below: but the position is assumed that, where they have property within the state, it is immaterial whether the property is in the first instance brought under the control of the court by attachment or some other equivalent act, and afterwards applied by its judgment to the satisfaction of demands against its owner; or such demands be first established in a personal action, and the property of the non-resident be afterwards seized and sold on execution. But the answer to this position has already been given in the statement,

that the jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment if void when rendered will always remain void; it cannot occupy the doubtful position of being valid if property be found, and void if there be none. Even if the position assumed were confined to cases where the non-resident defendant possessed property in the state at the commencement of the action, it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution, the defendant had or had not disposed of the property. If before the levy the property should be sold, then, according to this position, the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law: the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently. In Webster v. Reid, reported in 11th of Howard, the plaintiff claimed title to land sold under judgments recovered in suits brought in a territorial court of Iowa, upon publication of notice under a law of the territory, without service of process; and the court said:

"These suits were not a proceeding *in rem* against the land, but were *in personam* against the owners of it. Whether they all resided within the territory or not does not appear, nor is it a matter of any importance. No person is required to answer in a suit on whom process has not been served, or whose property has not been attached. In this case, there was no personal notice, nor an attachment or other proceeding against the land, until after the judgments. The judgments, therefore, are nullities, and did not authorize the executions on which the land was sold."

The force and effect of judgments rendered against non-residents without personal service of process upon them, or their voluntary appearance, have been the subject of frequent consideration in the courts of the United States and of the several states, as attempts have been made to enforce such judgments in states other than those in which they were rendered, under the provi-

sion of the constitution requiring that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state;" and the act of Congress providing for the mode of authenticating such acts, records, and proceedings, and declaring that, when thus authenticated, "they shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are or shall be taken." In the earlier cases, it was supposed that the act gave to all judgments the same effect in other states which they had by law in the state where rendered. But this view was afterwards qualified so as to make the act applicable only when the court rendering the judgment had jurisdiction of the parties and of the subject matter, and not to preclude an inquiry into the jurisdiction of the court in which the judgment was rendered, or the right of the state itself to exercise authority over the person or the subject matter. M'Elmoyle v. Cohen, 13 Pet. 312. In the case of D'Arcy v. Ketchum, reported in the 11th of Howard, this view is stated with great clearness. * * *

[The opinion then reviews Insurance Co. v. French, 18 How. 404; Bissell v. Briggs, 9 Mass. 462; Kilburn v. Woodworth, 5 John. (N. Y.) 37.]

Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the state resisted on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdic-

tion by service of process within the state, or his voluntary appearance.

Except in cases affecting the personal status of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance, as hereinafter mentioned, the substituted service of process by publication, allowed by the law of Oregon and by similar laws in other states, where actions are brought against non-residents, is effectual only where, in connection with process against the person for commencing the action, property in the state is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding *in rem*. As stated by Cooley in his Treatise on Constitutional Limitations, 405, for any other purpose than to subject the property of a non-resident to valid claims against him in the state, "due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered."

It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state, they are substantially proceedings *in rem* in the broader sense which we have mentioned.

It is hardly necessary to observe that in all we have said we have had reference to proceedings in courts of first instance, and to their jurisdiction, and not to proceedings in an appellate tribunal to review the action of such courts. The latter may be taken upon such notice, personal or constructive, as the state creating the tribunal may provide. They are considered as rather a continuation of the original litigation than the commencement of a new action. Nations et al. v. Johnson et al., 24 How. 195.

It follows from the views expressed that the personal judg-

ment recovered in the state court of Oregon against the plaintiff herein, then a non-resident of the state, was without any validity, and did not authorize a sale of the property in controversy.

To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a state may not authorize proceedings to determine the status of one of its citizens towards a non-resident, which would be binding within the state, though made without service of process or personal notice to the non-resident. The jurisdiction which every state possesses to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The state, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties guilty of acts for which, by the law of the state, a dissolution may be granted, may have removed to a state where no dissolution is permitted. The complaining party would, therefore, fail if a divorce were sought in the state of the defendant; and if application could not be made to the tribunals of the complainant's domicile in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress. Bish. Marr. and Div., § 156.

Neither do we mean to assert that a state may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the state to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the state. As was said by the Court of Exchequer in Vallee v. Dumergue, 4 Exch. 290, "It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode

of notification has been followed, even though he may not have actual notice of them." See also The Lafayette Insurance Co. v. French et al., 18 How. 404, and Gillispie v. Commercial Mutual Marine Insurance Co., 12 Gray (Mass.), 201. Nor do we doubt that a state, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions would hold their interest subject to the conditions prescribed by law. Copin v. Adamson, Law Rep. 9 Ex. 345.

In the present case, there is no feature of this kind, and, consequently, no consideration of what would be the effect of such legislation in enforcing the contract of a non-resident can arise. The question here respects only the validity of a money judgment rendered in one state, in an action upon a simple contract against the resident of another, without service of process upon him, or his appearance therein.

Judgment affirmed.

BEYER v. CONTINENTAL TRUST CO.

63 Missouri Appeals, 521. [*1895.*]

SMITH, P. J. This is an action somewhat in the nature of a creditor's bill. Briefly analyzed, the allegations of the petition are:

First. That the Continental Trust Company, a Missouri corporation, became insolvent on April 1, 1890, and thereafter remained so. Second. That at and since April 1, 1890, defendant L. V. Harkness owned $5,000 of its capital stock. Third. That since April 1, 1890, said Harkness has received $1,200 dividends on his capital stock. Fourth. That between March 25, 1890, and November 5, 1892, said corporation became indebted to the plaintiff in the sum of $2,118.51, which sum was due plaintiff on said last day. Fifth. That on November 5, 1892, said corporation made an assignment for the benefit of its creditors, and that plaintiff's demand has been presented to the assignee and allowed

and a dividend of three per cent has been paid on it by the assignee, but that no more will be realized. Sixth. That defendant Harkness is a non-resident and can not be served with process in this state and that he owns certain real estate in this state (describing it). Seventh. That plaintiff can not, because of defendant's non-residence and the nature of his demand, procure either a personal judgment against defendant, or a judgment by attachment process, or otherwise at law, and is without remedy at law. Eighth. Prays for judgment against defendant L. V. Harkness for $1,200, and that his said real estate be adjudged to be sold to satisfy the same.

On filing the petition an order was made, directed to the defendant Harkness, notifying him of the commencement of the suit, and stating the object and general nature of the petition to be to recover a judgment against him for $1,200, and to have said real estate charged with the payment thereof. Proof of the publication of the order was made, when defendant Harkness appeared specially in the cause and moved the court to quash the proceedings, on the ground that same were irregular, illegal and void. The court sustained the motion, whereupon plaintiff has appealed to this court.

All the authorities are agreed that a dividend paid by an insolvent corporation to a stockholder, as against a creditor at that time, is merely a gift as against said creditor, and is, in law, fraudulent and void. Herman v. Britton, 88 Mo. 549; Gill v. Bales, 72 Mo. 424; Williams v. Boice, 38 N. J. Eq. 364; s. c., 6 Am. & Eng. Corp. Cases, 361; Bartlett v. Drew, 57 N. Y. 587; Hastings v. Drew, 76 N. Y. 9. And all persons receiving a gift from an insolvent corporation are held to account to judgment creditors for such gifts, and the proper remedy is by an action in the nature of a creditor's bill by a judgment creditor. Roan v. Winn, 93 Mo. 503. And it has been several times ruled by the appellate courts of this state that an attachment can issue only on a legal demand and not on an equitable claim. Bachman v. Lewis, 27 Mo. App. 81; Beach v. Baldwin, 14 Mo. 597; Lackland v. Garesche, 56 Mo. 267.

The plaintiff contends that he has the right to reach the money in the hands of the defendant, as a part of the assets of the trust company applicable to the payment of its debts, and its creditors have a lien thereon and the right of priority of payment over its stockholders. But the lien of the creditors of an insolvent cor-

poration upon its assets in the hands of others, is a purely equitable lien and can only be enforced in an equitable proceeding. McLean v. Eastman, 21 Hun. 312. It is conceded that upon such mere equitable claim no attachment can issue. And it is, in effect, conceded by the allegations in the petition that the defendant Harkness acquired a valid title to the money paid him as a dividend by the trust company, as against it and its assignees. Bartlett v. Drew, 57 N. Y. 587; Von v. Grant, 16 Mass. 7.

Turning to the allegations of the petition, it is seen that no connection is there traced between dividends and the real estate. It is not alleged that the dividends were used by the defendant Harkness in the purchase of the real estate. But the plaintiff contends that the proceeding can be upheld under a provision of the statute, section 2022, Revised Statutes, which provides that, "in all actions at law, or in equity, have for their immediate object the enforcement or establishment of any lawful right, claim, or demand to or against any real or personal property within the jurisdiction of the court," etc.

The prayer of the petition is for judgment against defendant for the amount of the dividends received by him of the trust company and for a decree that the defendant's lands be sold as upon execution and the proceeds thereof applied to the satisfaction of the judgment. The first part of the decree prayed for is no more than a judgment *in personam*, and could not be effective in the absence of actual notice—that is, notice by summons. The general rule is that where a decree or judgment creates a personal duty or obligation, or declares a personal charge, the proceedings are ineffective unless there be actual notice. Pennoyer v. Neff, 95 U. S. 714.

This brings us to the consideration of the decisive question in the case, which is that of jurisdiction of the *res*—the property. Jurisdiction of the *res* is said to be obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. So, while the general rule in regard to jurisdiction *in rem* requires the actual seizure and possession of the *res* by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import and which stand for and represent the dominion of the court over the thing, and, in effect, subject it to the control of the court. Among this latter class is the levy of a writ of attachment, or seizure of real estate, which, being incapable of removal

and lying within the territorial jurisdiction of the court, is for all practical purposes brought under the jurisdiction of the court, by the officer of the court levying the writ and return of that fact into court. So the writ of garnishment or attachment, or other form of service on a party holding a fund which becomes the subject of litigation, brings that fund into court, though the money remain in the actual custody of one not an officer of the court. An action commenced in partition of real estate, foreclosure of a mortgage, or enforcement of a lien, and the like, so far as they effect the property in the state, are substantially proceedings *in rem*.

There are cases, not partaking of the nature of proceedings *in rem*, where the judgment is to have effect on personal rights, as in divorce suits, or in proceedings to compel conveyances, or other personal acts, in which the legislature has properly made the jurisdiction to depend on the publication of notice, or on the bringing the suit to the notice of the party in some other mode, when he is not in the territorial jurisdiction. Cooper v. Reynolds, 10 Wall. 308; Boswell v. Otis, 9 How. (U. S.) 336; Pennoyer v. Neff, *supra;* Hawes on Jurisdiction, § 233.

The case in hand does not fall within any of these categories. Substituted service by publication, or in any other authorized form, may be sufficient to inform non-residents of the object of proceedings taken when property is once brought under the control of the court by seizure, or some equivalent act. The jurisdiction of a court to inquire into and determine their obligations at all, is only incidental to its jurisdiction over property.

In this case there has neither been a seizure nor its equivalent. Nor is there any pretense of the existence of a lien of any kind which it is sought to enforce against the property. The court could acquire no jurisdiction over the property until it should, by its findings and decree, establish the plaintiff's claim and pronounce judgment thereon in his favor, for the amount thereof, and cause a seizure of the same under its decree. From the commencement of the suit until then, the court had not acquired jurisdiction over the property. The judgment being personal and on substituted service, would, of course, be void. Wilson v. Railroad, 108 Mo. 588; Smith v. McCutchem, 38 Mo. 415; Latimer v. Railroad, 43 Mo. 105.

The proceeding up to the time of the seizure of the property, under the decree, would constitute no legal impediment to the

sale of it by the defendant, because there had been no previous seizure, or other equivalent act, bringing it under the control of the court. It was until then as if no such suit had been commenced. If this be so, which can hardly be disputed, the validity of the judgment would depend upon whether the defendant had disposed of the property before the seizure of it under the decree. If he had, the decree would be ineffectual. This would introduce an element of uncertainty into judicial proceedings, which is not sanctioned by the law, for as said in Pennoyer v. Neff, *supra*, the validity of every judgment depends upon the jurisdiction of the court before it is rendered. And while the statute provides that on substituted notice, the court is authorized to afford relief in all actions at law, or in equity, which have for their object the enforcement or establishment of any right, claim, or demand against any real or personal property within its jurisdiction, this authority must be limited and confined to those cases where it obtains jurisdiction over the *res* by seizure, or its equivalent, or in those where there is some lien against the property in existence when the action is commenced, which may be enforced by its decree. The mere fact that the property is within the territorial jurisdiction of the court will not be sufficient, unless it has, in some way, acquired jurisdiction over it. It is immaterial whether the proceeding against the property be by an attachment, or bill in equity. It must be substantially a proceeding *in rem*.[1]

This is the result of all the authorities at which we have looked, including Wilson v. Railroad, *supra;* Arndt v. Gregg, 134 U. S. 316; Cooley, Const. Lim. 500, 501, cited by the plaintiff. If the state has the constitutional power to enact a statute authorizing a decree on substituted notice, in a case like this, we do not think it has yet done so. In our opinion, the ruling of the court below on the motion was not erroneous and therefore the judgment will be affirmed. All concur.

[1] For an elaborate discussion of the cases in which service by publication may be had on a non-resident without seizure of property, see Pana v. Bowler, 107 U. S. 529; Arndt v. Gregg, 134 U. S. 316.

BICKERDIKE v. ALLEN.

157 Illinois, 95. [*1895.*]

Mr. Justice MAGRUDER delivered the opinion of the court:

This is a creditor's bill, filed on December 17, 1891, in the Superior Court of Cook county by the appellees, as executors of the estate of Edwin C. Allen, deceased, against appellant and others, based upon a judgment recovered by said testator, in his lifetime, on November 20, 1873, against appellant and one Pratt, and claimed to have been revived by judgment of revival entered on December 9, 1891, upon which execution was issued and returned unsatisfied after demand made. Amendments were filed to the original bill, and afterwards a supplemental bill was filed. Answers were filed by the appellant, and other defendants alleged to have in their hands stock belonging to appellant. A receiver was appointed by agreement of parties with directions to sell the stock, and hold the proceeds to abide the final disposition of the case.

The answer of the appellant here to the creditor's bill below set up, among other things, that in the *scire facias* proceeding to revive the judgment, the revival judgment was void, because the court obtained no jurisdiction over the appellant by personal service or entry of appearance; and that section 26 of the Practice Act (chap. 110, sec. 26 of Rev. Stat.; 2 Starr & Cur. Stat., page 1789) was unconstitutional, as being in conflict with section 2 of article 2 of the constitution of Illinois, which provides that "no person shall be deprived of life, liberty or property without due process of law," and also as being in conflict with section 1 of the fourteenth amendment to the constitution of the United States. Appellant's answer to the bill admits, that the judgment was recovered against himself and Pratt on November 20, 1873, as alleged in the bill, and that, on October 1, 1891, appellees instituted proceedings by *scire facias* in said Superior Court to revive said judgment, and that execution was issued upon the judgment as revived and returned *nulla bona*. The answer also sets out in full all the proceedings in the suit to revive from the praecipe for a *scire facias* to the judgment of revival.

Upon the hearing, appellees introduced in evidence the said proceedings as set out in the answer; the appellant introduced no evidence whatever, but, at the close of the evidence introduced

by appellees, made a motion to dismiss the bill, upon the alleged grounds, that the court had no power to enter a judgment of revival for want of jurisdiction over appellant, and that the said section 26 was unconstitutional as aforesaid; and also because of certain alleged defects in the affidavit for publication and the publication notice in the *scire facias* proceeding. This motion was overruled, but no exception is shown by the bill of exceptions to have been taken to the order overruling it.

The court below rendered a decree, finding that the original judgment remained due and unpaid; that it had been duly and regularly revived; that the proceedings by *scire facias* to revive it were valid and legal, and directed that there should be paid out of the proceeds of the sale of said stock the original judgment and interest from the date of its rendition, and the costs accrued both in the original proceeding and in the *scire facias* proceeding. From this decree the present appeal is prosecuted.

First, as to the alleged unconstitutionality of section 26: That section is as follows: "It shall not be necessary to file a declaration in any *scire facias* to revive a judgment or foreclose a mortgage, in any court of record in this State. And in any such case of *scire facias* to revive a judgment, where the plaintiff in the judgment sought to be revived, or his attorney, shall file an affidavit in the office of the clerk of the court out of which the writ issues, showing that the defendant in the *scire facias* resides or has gone out of the State, or is concealed within the State, so that process cannot be served on him, and stating the place of residence of such defendant, if known, or that on due inquiry his place of residence cannot be ascertained, then in such case notice to the defendant may be given by publication and mail, in the same manner as is provided by statute for notice in like cases in chancery." (2 Starr & Cur. Stat., page 1789.) The provision for notice in cases in chancery, so far as applicable, is as follows: "The clerk shall cause publication to be made in some newspaper printed in his county * * * containing notice of the pendency of such suit, the names of the parties thereto, the title of the court, and the time and place of the return of summons in the case; and he shall also, within ten days of the first publication of such notice, send a copy thereof by mail, addressed to such defendant whose place of residence is stated in such affidavit. The certificate of the clerk, that he has sent such

notice in pursuance of this section, shall be evidence." (Rev. Stat. Ill., Chap. 22, § 12.)[1]

Where the defendant is a non-resident of the State of Illinois, and the proceeding is not *in rem*, but *in personam*, the publication of notice and the mailing of a copy thereof to an address outside of the State, without personal service or appearance, would not give to a court in this State such jurisdiction over the person of the defendant as to make a judgment *in personam* against him valid and impervious to collateral attack, except in cases affecting the personal or civil status and capacities of the citizen of the State towards a non-resident, as, for instance, in reference to the dissolution of the marriage relation, and except in cases where another mode of service than that of personal service may be regarded as having been assented to in advance, as, for instance, the appointment of agents in the State to receive service, and requirements as to service upon corporations created by the State. (Pennoyer v. Neff, 95 U. S. 714.)

A proceeding *in rem* is not merely a direct proceeding against property, but any action between the parties where the direct object is to reach and dispose of property owned by them or of some interest therein. For example, suits by attachment against the property of debtors, suits for the partition of land, to foreclose mortgages, to enforce liens or contracts respecting property, may be regarded as proceedings *in rem* so far as they affect property in the State. (Pennoyer v. Neff, *supra*.) In such proceedings *in rem*, where the object is to reach and dispose of property within the State, or of some interest therein, service by publication, or in some mode other than upon the person, may be sufficient. The theory of the law is, that when a man's property is brought under the control of the court by seizure, such seizure informs and notifies him of the proceedings taken for its sale or condemnation. In such cases constructive notice is permitted and becomes effectual solely by reason of the attachment or seizure of the property. The jurisdiction of the court to determine the obligations of the defendant constructively notified is incidental to its jurisdiction over the property. The judgment has no effect beyond the property reached or affected in that suit. "Jurisdiction is acquired in one of two modes:

[1] The publication in this case was based on an affidavit to the effect that the defendant had concealed himself to avoid service, see p. 105.

First, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court." (Boswell's Lessee v. Otis, 9 How. 336.)

"But," says Mr. Justice FIELD in Pennoyer v. Neff, *supra*, "where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability." (See, also, Webster v. Reid, 11 How. 437.)

So far as section 26 applies to defendants residing out of this State we do not see how it can be upheld as a valid law in view of the principles hereinbefore announced. That is to say, where the proceeding by *scire facias* is instituted to revive a judgment rendered against a non-resident, the judgment of revival cannot be regarded as valid, if such non-resident has not been personally served, or has not entered his appearance, but has only been served by publication and the mailing of a notice to him to his residence outside of the State. The *scire facias* proceeding to revive a judgment is not a proceeding *in rem;* certainly not, where the original judgment sought to be revived is a judgment *in personam.* Although the non-resident may receive the notice mailed to his residence out of the State, he is not bound to appear, because "no State can exercise direct jurisdiction and authority over persons or property without its territory." (Pennoyer v. Neff, *supra.*) We held, in Cloyd v. Trotter, 118 Ill. 391, that service out of the State by copy of the bill and notice in a chancery case, so far as property in this State was sought to be affected, would give the court jurisdiction to decree concerning it, but not to render a personal decree against the defendant for the recovery of money or costs, and to award a general execution against him for the collection of the same.

If the statute provided for bringing in a resident of the State by publication of the notice only without the mailing of any

notice to him, the same objection might lie as in case of a non-resident. A judgment *in personam* in the court of a State against one of its citizens who is not served with process, but is served by publication only, cannot be valid, except in cases coming within the exceptions already indicated. In Webster v. Reid, *supra*, it was said: "These suits were not proceedings *in rem* against the land, but were *in personam* against the owners of it. Whether they all resided within the territory or not does not appear, nor is it a matter of any importance. No person is required to answer in a suit on whom process has not been served, or whose property has not been attached." So, in Pennoyer v. Neff, *supra*, it was said, that such judgments were not binding in the State where rendered any more than they were outside of such State, and that, since the passage of the fourteenth amendment to the Federal Constitution, their enforcement in the State could be resisted "on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties, over whom that court has no jurisdiction, do not constitute due process of law."

But this statute does something more than require the publication of the notice; it requires a copy of the notice to be sent by mail addressed to the defendant whose place of residence is stated in the affidavit. Suppose that a defendant resides in this State, and has a known residence here, but conceals himself so that process cannot be served upon him, and that the notice specified in the statute is sent to him by mail. If he receives the notice so sent he has received personal notice just as much as though a summons was served upon him by the sheriff. The certificate of the clerk is made proof of the mailing of the notice. "Proof of the mailing of notices, properly addressed, is *prima facie* evidence of their having been received by the party addressed." (Meyer v. Krohn, 114 Ill. 574; Young v. Clapp, 147 id. 176.) When, therefore, in any collateral proceeding, a judgment of revival based upon notice, given through the mail as well as by publication to a resident of the State, is relied upon, it is *prima facie* valid. In such case the judgment cannot be said to have been rendered without jurisdiction over the defendant.[2] The

[2] The validity of such judgments has been recognized in other jurisdictions, Bryant v. Shute, 147 Ky. 268; Hamil v. Talbott, 72 Mo. App. 22. But see Moss v. Fitch, 212 Mo. 484; De la Montanya v. De la Montanya, 112 Cal. 101.

proceeding by *scire facias* to revive a judgment is not a new suit, but merely the continuation of the old one. It does not determine the obligations of the defendant to the plaintiff as involved in the original controversy and as settled by the former judgment, but merely seeks a revival of the former judgment in order to have execution of it. The defendant cannot show any matter, which was pleaded or might have been pleaded in the former action. The only defenses, which can be set up in the *scire facias* proceeding, are that no judgment was rendered, or, if one was rendered, that it has been satisfied or discharged. (21 Am. & Eng. Ency. of Law, pages 855, 864; Smith v. Stevens, 133 Ill. 183.)

Hence, we are inclined to think that section 26, taken in connection with section 12 of the Chancery act, is a constitutional enactment so far as it provides for service by publication of notice and mailing of copy thereof to residents of the State, whose residence is stated in the affidavit.

BARDWELL v. COLLINS.

44 Minnesota, 97. [*1890.*]

Appeal by defendant Henry H. Collins, impleaded with Emilie Anderson and others, from an order of the District Court for Hennepin County, YOUNG and SMITH, JJ., presiding, refusing to set aside, as to him, a judgment by default in an action to enforce a mechanic's lien.

MITCHELL, J., after holding that the statute provided for service by publication without regard to the residence of the defendant:[1] * * * The only remaining question, therefore, is whether it is competent for the legislature to authorize such

[1] Gen. St. 1878, c. 81, tit. 2, § 28: "Service by publication of the summons, in the manner provided in section five of title one of this chapter for publication of the notice of sale therein specified, may be made upon all parties to the action against whom no personal judgment is sought; and in such case judgment may be taken, without giving security as to those parties, at the expiration of twenty days after the completion of the period of publication; but such parties, or any of them, shall be permitted to appear and defend, upon good cause shown, at any time before final decree."

service in such actions upon residents of the State personally present, and capable of being found and personally served, within its jurisdiction. Is such service "due process of law?" In determining this question, it becomes important, first, to consider the character of an action to foreclose a mortgage. It is not an action *in rem*, but an action *in personam*. It is true it has for its object certain specific real property against which it is sought to enforce the lien of the mortgage, and in that sense it partakes somewhat of the nature of a proceeding *in rem*, but not differently, or in any other sense, than do actions in ejectment, replevin, for specific performance of a contract to convey, to determine adverse claim to real estate, and the like. The rights and equities of all parties interested in the mortgaged premises are to be adjudged in the action, which proceeds, not against the property, but against the persons; and the judgment binds only those who are parties to the suit, and those in privity with them. Whalley v. Eldridge, 24 Minn. 358. Next, it is not only an action *in personam*, but is also strictly judicial in its character, proceeding according to the due course of common law, like any other ordinary action cognizable in courts of equity or common law. These facts are important for the reason that what would be due process of law in one kind of proceeding might not be such in another, for reasons that will be alluded to hereafter.

No court has ever attempted to give a complete or exhaustive definition of the term "due process of law," for it is incapable of any such definition. All that can be done is to lay down certain general principles and apply these to the facts of each case as they arise. Mr. Webster, in his argument in the Dartmouth College case, gave an exposition of the words "law of the land" and "due process of law," which has often been quoted by the courts with approval, viz.: "The general law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." In judicial proceedings, "due process of law" requires notice, hearing and judgment. It does not mean, of course, the general body of the law, common and statute, as it was at the time the constitution took effect; for that would deny to the legislature the power to change or amend the law in any particular. Neither, on the other hand, does "the law of the land" or "due process of law" mean anything which the legislature may see fit to declare to be such; for there are certain fundamental rights which our system of jurisprudence

has always recognized, which not even the legislature can disregard in proceedings by which a person is deprived of life, liberty or property; and one of these is notice before judgment in all judicial proceedings. Although the legislature may at its pleasure provide new remedies or change old ones, the power is nevertheless subject to the condition that it cannot remove certain ancient landmarks, or take away certain fundamental rights, which have been always recognized and observed in judicial procedures. Hence, it becomes important, in determining what kind of notice should constitute "due process of law" in any judicial proceeding affecting a man's property, to ascertain what notice has always been required and deemed essentially necessary in actions or proceedings of that kind, according to that system of jurisprudence of which ours is derivative. In proceedings *in rem*, as in admiralty and the like, where the process of the court goes against the thing, which is in the custody of the court and is technically the defendant, and persons are not made parties to the suits but come in rather as intervenors, it is not essential to the jurisdiction that the persons having an interest in the thing to be effected by the judgment should have personal notice of the proceeding, or in fact any other notice than such as is implied in the seizure of the thing itself. There are other proceedings in the nature of proceedings *in rem*, many of them not strictly judicial, and none of them proceedings according to the course of common law, such as the probate of wills, administration on the estates of deceased persons, the exercise of the right of eminent domain, the exercise of the power of taxation, which affect property rights, but in which personal notice to persons interested in the subject or object of the proceedings has never been deemed necessary. Some form of substituted service of notice, as by publication, has always, from considerations of public policy or necessity, been deemed appropriate to such proceedings, and hence, as to them, "due process of law." But we think that, from the earliest period of English jurisprudence down to the present, as well as in the jurisprudence of the United States derived from that of England, it has always been considered a cardinal and fundamental principle that, in actions *in personam* proceeding according to the course of common law, personal service (or its equivalent, as by leaving a copy at his usual place of abode) of the writ, process or summons must be made on all defendants

resident and to be found within the jurisdiction of the court. We do not mean that the term "proceeding according to the course of the common law," as used in the books, is to be understood as meaning, necessarily and always, personal or actual service of process; for, although service by publication is of modern origin, there has always been some mode by which jurisdiction has been obtained at common law by something amounting to or equivalent to constructive service, where the defendant could not be found and served personally. But what we do mean to assert is that the right to resort to such constructive or substituted service in personal actions proceeding according to the course of the common law rests upon the necessities of the case, and has always been limited and restricted to cases where personal service could not be made because the defendant was a non-resident, or had absconded, or had concealed himself for the purpose of avoiding service. As showing what means were resorted to as amounting or equivalent to constructive service, and how strictly it was limited to cases of necessity by both courts of common law and courts of chancery, reference need only be had to 3 Bl. Comm. 283, 444.

As a substitute for the means formerly resorted to in England in such cases, most of the American states have adopted service of the process or summons by publication. But we have found no statute, except the one now under consideration, which has assumed to authorize such a mode of service, and have found no case where its validity has been sustained by the courts, except as to defendants who could not be found within the jurisdiction, either because of non-residence, or because they had absconded or concealed themselves to avoid the service of process. We think this will be found true in every instance, from the earliest decisions on the subject down to the latest utterance of the Supreme Court of the United States in Arndt v. Greggs, 134 U. S. 316 (10 Sup. Ct. Rep. 557), in which that court took occasion to set at rest some misapprehensions as to the scope of their previous decision in Hart v. Sansom, 110 U. S. 151 (3 Sup. Ct. Rep. 586). We think it would be a surprise to the bench and the bar of the country if it should be held that process or summons in ordinary civil actions might be served on resident defendants, present and capable of being found within the jurisdiction of the court, merely by publication in a newspaper. The dangers and abuses that would arise from such a practice

are too apparent to require to be named or even suggested. So radical a departure is this from the uniform and well established ideas of what constitutes due process of law in such cases that, although this act has been on the statute books for twenty-four years, we doubt whether one lawyer in twenty is aware of its existence; and we have yet to hear of any case, except the present, where any one has ventured to act upon it.

It is, in our judgment, beyond the power of the legislature to disregard so fundamental and long-established a principle of our jurisprudence. Service by publication, under such circumstances, is not "due process of law," and therefore any statute assuming to authorize it is unconstitutional. It would be of little use to cite authorities upon a subject which has been so much and so often discussed in its many phases, as each case must be determined upon its own facts, and hence the decided cases would ordinarily be in point only by way of analogy. See, however, Brown v. Board of Levee Com'rs, 50 Miss. 468.

Order reversed.

NELSON v. C. B. & Q. RY. CO.

225 Illinois, 197. [*1907.*]

Plaintiff brought an action on the case against the C. B. & Q. Railroad Company, an Illinois corporation, and being unable to obtain ordinary service in Kane County, because the defendant did not maintain an office therein, proceeded by publication and mail under the provisions of par. 5 of the Practice Act, now § 8, chap. 110, R. S., 1913. On the motion of the defendant the court quashed the service and dismissed the action, and the plaintiff appealed.[1]

Mr. Justice HAND delivered the opinion of the court: * * *

We are unable to discover from a reading of these sections of the statute why they are not broad enough in their terms to include a case like this, or any other action at law which may be brought against an incorporated railroad company, where no

[1] Statement condensed.—Ed.

officer or agent of the company is found in the county where the suit is brought with whom a copy of the summons can be left to effect service upon the railroad company, and where it appears the principal office of the railroad company is located within the State of Illinois. * * *

We are clearly of the opinion the statute is broad enough to cover a case like the one at bar if the legislature has power to authorize service in such a case in that manner. If, however, under no circumstances a personal judgment in an action at law like this can be based upon a service of process by publication and mail, then the service of process here was bad and was properly quashed—which brings us to consideration of the appellee's second proposition. * * *

[The opinion here reviews Bimeler v. Dawson, 4 Scam. 536; Welch v. Sykes, 3 Gilm. 197; Smith v. Smith, 17 Ill. 482; Bickerdike v. Allen, 157 Ill. 95; Bardwell v. Collins, 44 Minn. 97.]

Constructive service of process, it is said, is authorized in a certain class of cases, such as when the defendant has gone out of the State, or when he cannot be found, or when he conceals himself so that process cannot be served upon him, as the result of necessity—that is, such constructive service of process is substituted for actual service of process when actual service of process cannot be had upon a defendant. In this case actual service could not be had upon the defendant although the suit was properly brought in the court from which the process was issued and the defendant was a resident of and was in the State, and the question here is narrowed to this: Can the legislature provide a constructive or substituted service of process by publication and mail, in lieu of actual service of process, in a case where the process cannot be actually served upon the defendant in the county where the statute expressly authorizes the suit to be commenced, although the defendant resides and is in the State? * * *

While the authorities are not in entire harmony upon the subject, the Illinois cases and the greater weight of authority clearly establish, we think, the proposition that a personal judgment in an action at law may be rendered against a defendant residing in and who is in the State where the suit or proceeding is pending, who has been notified of the pendency of the suit by constructive service of process, where it appears actual service of process could not be had upon the defendant, if the construc-

tive service provided for was required to be had in such manner that the reasonable probabilities were that the defendant would receive notice of the pending action or proceeding before judgment or decree was rendered against him.

A full discussion of the subject of the right of a court to render a personal judgment or decree against a defendant upon constructive service of process will be found in an exhaustive note to the case of Pinney v. Providence Loan and Investment Co. (Wis.), 50 L. R. A. 577. The learned author, on page 584, says: "As is shown by the cases cited in the preceding subdivision, the court cannot acquire jurisdiction, by constructive or substituted service of process, to render a personal judgment against a non-resident defendant who does not appear, unless he can be deemed to have assented to such mode of service; but the rule is otherwise with respect to resident defendants—at least if they are within the State at the time of the attempted service. The manner of serving process must necessarily be regulated by every country for itself, and if a State permits process to be served upon one of its own citizens by the leaving of it, in his absence, at his domicile with an adult member of his household, that method of service is not so repugnant to the principles of natural justice that a foreign tribunal should refuse to recognize it and treat a sentence founded on it as a nullity. * * * The following cases expressly hold that it is competent for the legislature to authorize personal judgments against residents of the State upon constructive or substituted service of process, under proper conditions: Betancourt v. Eberlin (1882), 71 Ala. 461 (personal judgment in attachment); Fleming v. West (1896), 98 Ga. 778, 27 S. E. 157 (judgment for alimony); Bimeler v. Dawson (1843), 4 Scam. 536, 39 Am. Dec. 430; Bickerdike v. Allen, 157 Ill. 95, 29 L. R. A. 782, 41 N. E. 740; Sturgis v. Fay (1861), 16 Ind. 429, 79 Am. Dec. 440; Beard v. Beard, 21 Ind. 321 (obiter); Weaver v. Boggs (1873), 38 Md. 255 (obiter); Harryman v. Roberts (1879), 52 id. 65; Continental Nat. Bank v. Thurber, 74 Hun. 632, 26 N. Y. Sup. 956, affirmed by 143 N. Y. 648, 37 N. E. 828; Northcraft v. Oliver (1889), 74 Tex. 162, 11 S. W. 1121; Hinckley v. Kettle River Railroad Co., 70 Minn. 105, 72 N. W. 835."

We are of the opinion that the constructive service of process provided for in paragraph 5 of the Practice Act, when taken in connection with sections 12 and 13 of the Chancery Act, con-

stitutes due process of law when it appears, as it must before such service can be had, by the return of the officer, that the incorporated railroad company against which the suit is brought has no officer or agent in the county in which the suit is brought with whom a copy of the summons can be left to effect service upon the railroad company, and it further appears the principal office of the railroad company is in the State of Illinois.[2]

The judgment of the circuit court will therefore be reversed and the cause remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

SECTION 3. RETURNS.

(a) *Substance and Form.*

HARRIMAN v. STATE.

1 Missouri, 504. [*1825.*]

PETTIBONE, J. This was an action of assumpsit on a promissory note given to the State for loan office certificates, borrowed by the defendants at the loan office in Chariton. A summons was issued out of the Howard Circuit Court, which was personally served by the sheriff of Howard County upon Harriman; Green and Delany were returned not found. An alias summons issued to the County of Chariton against Green and Delany, which was returned personally served, by "Alexander Trent, deputy sheriff;" Harriman appeared and pleaded, and the issues were found against him; Green and Delany were called, but came not. Their default was entered, the damages assessed against them, and a joint judgment entered against all three of the defendants. It is contended that this judgment is erroneous inasmuch as there is no legal evidence of any service of the summons upon Green

[2] Compare: Pinney v. Ins. Co., 106 Wis. 396 (50 L. R. A. 577), annotated case, holding void a statute providing for service on a corporation by delivery of copy to a public officer, where there had been a failure to file a list of its own officers on whom service could be had. But see Ex parte Schallenberger, 96 U. S. 369.

and Delany; the return by the deputy sheriff in his own name, being no legal evidence. Although the deputy may do any act which the principal sheriff can, yet the law is well settled that every act must be done in the name of the sheriff. This return is, therefore, bad, and affords no evidence of any regular service of the summons upon Green and Delany. We have already decided that the return of the process constitutes a part of the record upon which error will lay. The judgment, as against Green and Delany, is, therefore, clearly erroneous. As against Harriman, the judgment would have been good, had it been several; but being entire and joint against all the defendants, if it is bad as to one it is bad as to all: vide Bac. Abr., tit. Error, letter M., p. 500. The judgment of the Circuit Court must, therefore, be reversed, with costs, and the cause remanded, to be further proceeded in according to law.

OGLE v. COFFEY.

2 Illinois, 239. [*1835.*]

SMITH, Justice, delivered the opinion of the court:

This was an action of debt on a judgment rendered in the State of Kentucky. Judgment was rendered by default in the Madison Circuit Court.

The principal error assigned is the want of personal service of the summons on the defendant. The return of the sheriff is not in compliance with the provision of the law directing the manner of making the service and return by the sheriff. The return of the sheriff is, "Executed October 18, 1832, as commanded within."

Whether the date specified is intended for the date of the day of service, or is the day on which the summons is returned is wholly uncertain. The manner of making the service is still more doubtful. Whether it was by reading the summons to the defendant or by delivering a copy, is left to conjecture, and it is impossible to say which course was adopted, or whether either was pursued.

The case falls directly within the rule laid down in the cases

of Wilson v. Greathouse and Clemson and Hunter v. Hamm, decided in June term, 1835. (*Ante* 174, 176.)

The judgment is reversed with costs.[1]

HAMMOND v. OLIVE.

44 Mississippi, 543. [*1870.*]

On writ of error to a judgment by default.

SIMRALL, J. It is complained in this court that there was not a sufficient service of the writ on Hammond. It has been established by a number of cases in this court that the return of the officer on the summons must show affirmatively a compliance with the requirement of the statute. If practicable, he must make personal service, and before he can resort to the secondary mode by leaving a copy at the domicile of the defendant, he must declare in his return that the party "could not be found." Foster v. Simmons, 40 Miss. 585, citing the cases, and many others subsequent, not necessary to be referred to. To make a service by "copy at the defendant's usual place of abode" complete, the return must show that every condition of the statute has been complied with. 1st. It must declare that the defendant "could not be found." 2d. That the copy was left with the wife, or some free white person above sixteen years of age. 3d. If there be no free white person there willing to receive the same, then the copy may be left at some public place at the dwelling house. The statute regards the three modes of service in the order named, as gradations. The second cannot be adopted, if the first can be made, nor the last, until both the others have failed, and the office should manifest, if he adopts the last mode, by his endorsement on the writ of "his acts under it," that he could not make personal service because the defendant could not be found, that he did not leave a copy with the wife, or some other person, etc., because no such person was at the "abode" or would accept the copy. We have been thus minute in the exposition of this subject (although it would seem to be

[1] And so where return failed to show time of service, Clemson v. Hamm, 2 Ill. 176.

unnecessary), in the hope that the officers charged with this duty may be clearly instructed as to its performance.

There are two specific imperfections in this return of the sheriff: 1st. "W. J. Hammond," with whom the copy was left, is not said to be a "free white person," whatever may be thought of the necessity of a change of the statute in this particular, because of the altered condition of the country. It is the simple duty of this court to expound the law as it is written—referring, where it properly belongs, modifications and amendments to legislative wisdom. The statute of Illinois is in its text almost identical with ours, "the copy may be left at the usual place of abode with some white person of the family," etc., is its language. In Cost v. Rose, 17 Ill. 277, the return omitted to describe the person with whom the copy was left as "white," this was held to be insufficient. In Thurmond v. Griggs, 2 Scamm. 366, the return was defective because the "person" was not said by the officer to be "of the family."

2d. This return is defective because the officer does not negative his ability to make personal service. The words, "he being absent," in their connection with the context, import that the defendant was not "at home"—was absent from "his place of abode." This may be true, but it does not follow that because of such absence "he could not be found;" he might have been at his nearest neighbor, or at the county town, and it might have been entirely feasible for the sheriff to have "found him." The words "he being absent," are not the equivalent of "could not be found." The officer is guilty of a palpable violation of duty under the law, to substitute the secondary service by copy, at the "abode," if he could, with the use of diligence, make personal service. Nor do we doubt his liability to an action for damages, if it was in his power to make a personal service, and he failed to do so, and thereby injury resulted to the plaintiff.

The judgment is reversed and cause remanded.[1]

[1] Accord: Settlemeyer v. Sullivan, 97 U. S. 444, *ante* p. 52.

Compare: Wright, C. J., in Neally v. Redman, 5 Ia. 386: The errors assigned relate alone to the sufficiency of the service of the original notice, to give the court below jurisdiction of the person of defendant. We shall consider the objections to this service as presented in the argument. The return of service is as follows:

"Received the within notice, April 14th, A. D., 1857, and return the within, served on Rezin A. Redman, by leaving a written and

BOTSFORD v. O'CONNER.

57 Illinois, 72. [*1870.*]

Ejectment for a tract of land to which the defendant claimed title under a judicial sale. The judgment below was for the plaintiff.[1]

Mr. Justice WALKER delivered the opinion of the court:

Was the service on Charles R. and Mary sufficient to give the court jurisdiction of their persons, so as to render a decree under which they could be divested of their title to this property? The return is, "served this writ on the within named Mary O'Conner and Charles R. O'Conner, the others not found in my county, the 26th day of August, 1858." This return fails to state how the writ was served; whether by copy, by reading, by posting notice or otherwise, does not appear.

To give the court jurisdiction of the persons of defendants, a legal service upon them is necessary. The mode of service of summons, when not otherwise provided by statute, is by reading the same to the defendants, and to each of them, and the return should show the time when, upon whom, and the manner in which, service was made, and unless it thus appeared, the court failed to

certified copy of the same with Margaret Ann Redman, she being a member of R. A. Redman's family, and over the age of fourteen years, and at his usual place of residence, in the town of Marengo, Iowa county, Iowa, said R. A. Redman not being found in my county at the time; this the 14th day of April, A. D. 1857.

"JAS. CRENSHAW.

"Sheriff, Iowa County, Iowa."

The notice was made returnable to the May term, 1857, of the Iowa District Court, which commenced on the 4th day of that month, and was directed to R. A. Redman.

To this service it is first objected that it does not show that the officer exercised proper diligence to serve defendant personally, before resorting to what is styled substituted service. The diligence used is not required to be stated in the return. If the officer returns that the defendant was not found in his county, he is presumed to have used the necessary diligence. If he did not in fact, and defendant is injured thereby, he has his remedy; but such failure cannot vitiate the return. It is true that he served the notice by leaving a copy on the same day he received it, and this, it is urged, is sufficient evidence that he made no effort to serve the defendant personally. But it may have been that he knew personally that defendant was not within his county, and that a strict regard to his duty required him to serve the notice at once, by copy.

[1] The statement has been condensed.—Ed.

acquire jurisdiction. Ball v. Shattuck, 16 Ill. 299. And in the case of Belingall v. Gear, 3 Scam. 575, it was held that it must affirmatively appear, from the officer's return, that there was a legal service, and that it was such service as gave the court jurisdiction over the person of the defendant.

But appellant contends that the decree cures the defective service; that it recites that it was shown to the court that due service of process was had upon the two minor defendants, and that the decree can not be contradicted by the summons and return. It is undeniably true, that this, like any other finding of the court, can never be contradicted in a collateral proceeding, by parol, or other evidence outside of the record in that proceeding. It, however, may by other portions of the same record. But such a finding is conclusive, in a collateral proceeding, until thus rebutted.

In the case of Clark v. Thompson, 47 Ill. 25, we said: "It is, however, insisted that when a court of general jurisdiction has proceeded to adjudicate a cause, we must presume that the court had evidence that there was such service, or appearance, as confers jurisdiction of the person; that the question of jurisdiction is primary, and must first be determined. This is no doubt true, in all collateral proceedings, but is liable to be rebutted. If the record shows service which is insufficient, and the record fails to show that the court found that it had jurisdiction, then the presumption is rebutted, and it must be held that the court acted upon the insufficient service. When a summons and return appear in the record, and there is no finding of the court from which it may be inferred that there was other service, or appearance, it will be presumed that the court acted upon the service which appears in the record. In this case, the summons and acknowledgment of service were not sufficient to confer jurisdiction over the minor defendants, and unless jurisdiction was otherwise obtained the decree, as to them, was a nullity and may be attacked in a collateral proceeding."

This is directly to the point, and fully embraces this question, and must be held to govern it.

The return of service being insufficient, we must hold that the court below had no jurisdiction of the persons of the minor heirs, against whom this summons was issued and the decree rendered.

Where the service is by summons, verbal testimony can not be received, to prove or aid it. That can be shown alone by the

officer's return.[2] It is no doubt otherwise where service is by publication, when parol evidence may be received to prove that the notice was published.

The service appearing in the record was defective in not showing the manner in which it was made, and as parol evidence could not be rightfully heard to aid it, we can not presume the court acted on other evidence than the return. It therefore rebuts the finding that there was service.

KNOWLES v. GAS & COKE CO.

86 U. S. 58. [*1873.*]

Error to the Circuit Court for the District of Minnesota.

The Logansport Gas, Light and Coke Company brought an action in the court below, against Alfred Knowles, on a judgment recovered by it against the said Knowles and one Thomas Harvey, in the Circuit Court for Cass County, Indiana. The defense to the action now brought was that that court did not have jurisdiction of the person of the defendant. The record of the former judgment was produced on the trial and was somewhat anomalous. Three defendants were sued in the Cass County Court—a certain J. W. Bain, Knowles and Harvey—none of whom resided in Indiana. Bain was served with process in New York, and after a long struggle to get the proceedings dismissed as to himself, removed the cause into the Circuit Court of the United States, under the act of 1866, and obtained a judgment in his favor. The cause was then remanded by the Cass County Court and judgment by default was rendered against Knowles and Harvey. In some respects the proceedings seemed to have been conducted as a suit on attachment, the property of the

[2] Madison County Bank v. Swan, 79 Mo. 527.

Compare: Jones v. Brick Co., 120 Ga. 321, in which it is said that it is the fact of service rather than the proof thereof by the return which is of actual importance.

But see Denison v. Smith, 33 Mich. 155, holding that the error of entering a default on an insufficient return, could not be cured by amendment of the return, for the reason that until a proper return was made the defendant was not bound to appear.

defendants (who resided in Minnesota) being attached, and other creditors being allowed to come in to participate in the proceeds. Nevertheless the record of the proceedings contained, amongst other things, the copy of a summons in the case, issued to the sheriff of Cass County, against all the defendants, and a return thereto in the following words:

"I do hereby certify that I served the within writ, on the 14th day of September, 1865, upon Alfred Knowles and Thomas Harvey, personally, by reading the same to them. And I further certify that J. W. Bain cannot be found in my bailiwick." * * *

Mr. Justice BRADLEY delivered the opinion of the court.

Upon the first point, that the return was insufficient, the plaintiff in error relies on a decision of Mr. Justice NELSON at the circuit, in the case of Allen v. Blunt, in which it is supposed to have been held that a return of service by the United States marshal, without showing that the service was made in his district, was insufficient to give the court jurisdiction of the person. What Justice NELSON held in that case was this: That inasmuch as the eleventh section of the Judiciary Act declares that "no suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ;" therefore, the jurisdiction of said courts depends on service or inhabitancy in the district, one of which should appear of record; and inasmuch as the record in that case contained no allegation on the subject and the jurisdiction of the court depended entirely on the marshal's return to the process, the return was insufficient to give it. This authority, therefore, is not in point. The case was in the United States Court, and depended upon the peculiar phraseology of the act of Congress referred to therein; whereas the case in Cass County, now under consideration, was in a State Court; and it is familiar law that a court of general jurisdiction will be presumed to have had jurisdiction of the cause and the parties until the contrary appears. In our judgment, therefore, the return, on its face, shows no ground of error. It will be presumed that the service was made in the proper county.

But the defendant also offered to prove by himself and Harvey that neither of them had ever in fact been served with process, and that, in consequence, the court had never, as to them, acquired jurisdiction of the person.

As this subject has lately been considered by us in the case of Thompson v. Whitman, it is unnecessary to go over the subject again. In our opinion the defendant had a right to show by proof that he had never been served with process, and that the Circuit Court of Cass County never acquired jurisdiction of his person. As this was refused him on the ground that the evidence was inadmissible, the judgment must be reversed. We do not mean to say that personal service is in all cases necessary to enable a court to acquire jurisdiction of the person. Where the defendant resides in the State in which the proceedings are had, service at his residence, and perhaps other modes of constructive service, may be authorized by the laws of the State. But in the case of non-residents, like that under consideration, personal service cannot be dispensed with unless the defendant voluntarily appears.

Judgment reversed, and a

Venire de novo awarded.

(b) *Falsifying.*

BARR v. SATCHWELL.

2 Strange, 813. [*1729.*]

A *scire facias* was returnable on the general return day (which was Sunday) and not served till the Monday. On affidavit whereof Sergeant Whitaker moved to set it aside, the sheriff having returned a *scire feci*. *Sed per curiam*, if that be a false return, the defendant will have his action against the sheriff. But we will not try the truth of the return on a motion to set aside the proceedings.[1]

GOUBOT v. DE CROUY.

1 Crompton & Meeson, 772. [*1833.*]

In this case the sheriff returned to a capias against the defendant, that he was not to be found in his bailiwick from the

[1] See also Rex v. Elkins, 4 Burr. 2129.

time of the delivery of the writ until the 18th of February; and that upon that day and until the return, the defendant was and yet is in the service of the Sicilian minister at the British court as a domestic servant.

Busby moved to set aside the return on strong affidavits, showing fraud and collusion between the sheriff's officer and the defendant; that the defendant was in trade; that he had said he was endeavoring to get attached to the embassy; and that he had been taken and collusively discharged by the officer.

BAILEY, B. We cannot interfere upon motion. Your only course is by bringing an action against the sheriff for a false return. We cannot investigate the truth of the return on affidavits.

Rule refused.

COLUMBIAN GRANITE COMPANY v. TOWNSEND.

74 Vermont, 183. [*1902.*]

TAFT, C. J. The defendant undertakes to impeach the officer's return, which is good on its face, by a plea in abatement, which is demurred to.

Nothing is better settled than that an officer's return is conclusive between the parties, except in a proceeding to set it aside. Yatter v. Pitkin & Miller, 72 Vt. 255, 47 Atl. 787. Mr. Gould says that a defendant cannot falsify such a return by plea in abatement, but must resort to his remedy against the officer, if it be false. Gould's Pl., chap. V, § 135.

In Barr v. Satchwell, 2 Stra. 813, a *scire facias* was returnable on the general return day, which was Sunday, and not served till the Monday. On affidavit whereof Sergeant Whitaker moved to set it aside, the sheriff having returned a *scire feci. Sed per curiam:* "If there be a false return, the defendant will have his action against the sheriff. But we will not try the truth of the return on a motion to set aside the proceedings."

The defendant seeks to avoid this rule, the plaintiff objecting, by reason of a stipulation below that "no question shall be raised as to the form of the plea, but that the question for the court to consider shall be, whether, upon the facts set forth in the plea,

there was a service of the writ." But this cannot be. When the parties go into special pleadings, the rule is universal that they shall be confined strictly to the matters put in issue. Campbell v. Hyde, 1 D. Chip. 65. And when pleadings close in a demurrer, no fact can be treated as in the case that does not appear from the pleadings and is not admitted by the demurrer, though admitted on hearing. Hartland v. Windsor, 29 Vt. 354. Parties can, of course, submit a case on agreed facts; but those facts must be within the issue, for the court tries only such issues as the parties make by their pleadings. Carpenter v. Welch, 40 Vt. at p. 255.

A demurrer admits only such facts as are well pleaded and therefore never admits an allegation that the pleadings show that party is estopped to make, for such an allegation is not well pleaded. Gould's Pl., chap. IX, § 25. Hence the facts here alleged in contradiction of the return, not being well pleaded, are not admitted by the demurrer and cannot be considered.

Judgment affirmed and cause remanded.[1]

SIBERT v. THORP.

77 Illinois, 43. [*1875.*]

This was an action of assumpsit by William W. Thorp against Jeremiah Sibert and Jeriel Wilday upon a promissory note.

The defendant Sibert, whom the sheriff's return showed was alone served with the summons, pleaded in abatement that at the time of the commencement of the suit he was a resident of Morgan county, Illinois, and was not, at the date of the commencement of the suit, found in the county of Morgan, and that process issued to the sheriff of Morgan county was served upon the defendant in the county of Scott, and not in the county of

[1] Accord: Slayton v. Chester, 4 Mass. 478 (plea in abatement); Stenson v. Snow, 10 Me. 263; Hallowell v. Page, 24 Mo. 590 (motion to quash return); Tilman v. Davis, 28 Ga. 494 (motion to set aside default).

The rule making the return conclusive, and limiting the aggrieved party to an action against the officer for a false return, does not violate the "Due Process" clause of the Constitution, Miedreich v. Lowenstein, 232 U. S. 236.

Morgan; and that at the time of such service of process, the defendant was not found or served with process by the sheriff in Morgan county, but was served in the county of Scott.

The plaintiff replied that process was issued and served upon the defendant in the county of Morgan and State of Illinois, and that defendant was not found and served with process in the county of Scott.

The defendant rejoined: 1st, that it does not appear of record that he was served with process in the county of Morgan, as alleged; and, 2d, that defendant was found and served with process in the said county of Scott, and not in the county of Morgan, as alleged, etc.

The court sustained a special demurrer to this rejoinder, and rendered judgment against the defendant for the amount shown to be due on the note, and the defendant appealed.

Mr. Justice SCHOLFIELD delivered the opinion of the court:

The question presented by the record in this case is, can the defendant, by pleading, raise an issue of fact on the return of a sheriff, endorsed on a summons, in the discharge of his official duty?

The old common law authorities seem to answer the question in the negative. Comyn, in his Digest (title "Return," "G"), says: "No averment can be taken in pleading against the sheriff's return. 15 East, 378. If false, the remedy is by action. Lofft, 371." And to the same effect is Allen on Sheriffs, 371. But in this country many courts have held that the sheriff's return, on original process, is only *prima facie* evidence of the facts recited, and consequently that it may be shown to be incorrect. See Watson v. Watson, 6 Conn. 334; Wendell v. Mergridge, 19 N. H. 112; Rowe v. Table Mountain Water Co., 10 Cal. 441; Carr v. Com. Bank of Racine, 16 Wis. 50; Bond v. Wilson, 8 Kans. 228.

In the Mineral Point R. R. Co. v. Keep, 22 Ill. 15, the question was discussed, although it was held to have been waived by the pleading, whether it was competent to show that the persons upon whom the writ was served were not in fact agents of the company, as recited by the return, and it was said: "We are not inclined to think the return of the officer, as to the fact of agency, when a corporation is sued should be conclusive. Great injustice and ruin to incorporated companies might be the

consequence had the officer the undisputed power to select any person he might choose as the agent of a company sued, and serve the process upon him. That he was the agent must be held to be a fact open to the country. * * * We think, therefore, that the fact of the agency could have been put in issue by plea in abatement of the writ, the defendants answering for that purpose only." In Owen v. Ranstead, 22 Ill. 162, bill in chancery was filed to set aside a judgment at law, on the ground that the defendant was not served with process, or, if served, it was under such circumstances as deceived him as to the truth of what was done. The bill was sustained, and the remedy was held to be appropriate. In Brown v. Brown, 59 Ill. 315, motion was made to set aside a decree for divorce, for the reason, supported by affidavits, that the person with whom a copy of the summons had been left was not, as stated in the sheriff's return, a member of the defendant's family. It was held that the decree should have been set aside. The court, after alluding to the general rule that the return of an officer can not be disputed, observe: "Where it is sought to contradict the return collaterally, and after rights have been acquired upon its faith, or innocent persons are to be injuriously affected, courts should firmly apply the rule. Such has been the action of this court in cases of that character.

"While, however, this is the well established general principle, cases have occasionally occurred, and will continue to do so, which, in order to prevent the perpetuation of a great wrong, must be treated as exceptional."

In Hickey v. Stone et al., 60 Ill. 459, it was held, on the authority of the previous decision just referred to, that a bill in chancery was proper to set aside a judgment at law, where there was no appearance, on the ground that the defendant had not been served with process, notwithstanding the sheriff's return showed there had been service.

The general principle recognized by these decisions is, necessarily, that the return of the sheriff is not an absolute verity, but merely that it is *prima facie* evidence of the truth of the matters therein recited, and, consequently, that it may be put in issue, before judgment, by plea in abatement. We are aware that, in thus holding, we are in conflict with *dicta* in many of the early decisions, still it is the logical result of the previous

decisions to which we have referred, and we do not perceive, in practice, that it can be productive of harmful results.

Considered as a question of abstract right, there can be no good reason why a party shall be denied to show to the court which is about to render judgment against him, that he is not, in fact, within its jurisdiction, and compelled to suffer a present wrong, with the mere probability of being able to repair it by another action against the officer by whose act it was caused. By allowing the truth of the return to be questioned before judgment, the delinquency or dishonesty of the officer is more speedily shown, there is greater certainty that injustice is not done by rendering judgment against those who, in fact, have not had the notice to which they are entitled by law, a multiplicity of actions is avoided, and it is not possible that the rights of innocent parties can be injured thereby.

Our conclusion is that the court below erred in not carrying the demurrer back, and sustaining it to the replication of the appellee. The judgment is reversed and the cause remanded.

Judgment reversed.[1]

HIGHAM v. STATE TRAVELERS ASS'N.

183 Fed. Rep. 845. [*1911.*]

VAN VALKENBURGH, District Judge. Robert Higham, plaintiff's husband, was insured in the defendant company against injury and death resulting through external, violent, and accidental means. The petition alleges that in March, 1907, the said Robert Higham received such accidental bodily injuries which, independently of all other causes, resulted in his death. Suit is brought for the recovery of $5,000 therefor. The defendant is a mutual insurance corporation organized and existing under the laws of the state of Iowa, with its headquarters and only office at Des Moines, Iowa. It is not authorized to do business in the

[1] There is an equally sharp conflict as to the power of a court of equity to relieve against a false return. See Smoot v. Judd, 184 Mo. 508, and cases there cited.

On a *scire facias* to revive a judgment the falsity of the original return can not be shown by extrinsic evidence, Bank v. Reed, 231 Ill. 246.

state of Missouri by the superintendent of insurance and maintains no agents or representatives in the latter state who solicit insurance or make any contract of insurance, or collect or receive any insurance premiums, or who adjust or settle losses, or pay the same for such insurance corporation.

Section 7992, Rev. St. Mo. 1899 (Ann. St. 1906, p. 3801) provides that in the case of such corporations service of summons shall be valid and legal "if made by delivering a copy of the summons and complaint to any person within this state who shall solicit insurance on behalf of any such insurance corporation, or make any contract of insurance, or collects or receives any premium for insurance, or who adjusts or settles a loss or pays the same for such insurance corporation, or in any manner aids or assists in doing either." Service in this case was made upon one Dr. B. F. Watson, as a proper person to be served under this statute. The defendant, appearing specially for the purposes of this motion, contends that he was not such a representative of the company as would make service upon him satisfy the requirements of due process of law.

The summons, with return of service, has been lost; but it is conceded that one was served upon Watson, and the plaintiff, in opposition to the motion, has filed Watson's deposition upon which she relies to establish his relationship to the defendant corporation. So that we are not concerned here with the form of the return, the only question being whether the service was valid and legal.

Plaintiff contends, first, that the return is conclusive, and that its truth cannot be controverted, citing Newcomb v. Railroad, 182 Mo. 678-704, 81 S. W. 1069. While this may be conceded, for the purposes of this case so far as it concerns the physical acts of the sheriff and recitals respecting the person upon whom service was made and the date of such service, it does not follow that the conclusions of law stated by the sheriff in his return may not be controverted.[1] In the federal court it is proper practice to try the question of the sufficiency of the service of a summons by motion to quash the return, supported by affidavit, and in the absence of statute a federal court is not required by the act of conformity to follow the state practice of trying this

[1] In a number of States the same rule is applied to questions of fact not within the personal knowledge of the officer, Walker v. Lutz, 14 Nebr. 274; Carr v. Bank, 16 Wis. loc. 56.

question.[2] Wall v. Chesapeake & Ohio Ry. Co., 95 Fed. 398, 37 C. C. A. 129. And such is the uniform practice. Commercial Mutual Accident Co. v. Davis, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782; St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569.

[2] On the method of raising the question the principal case follows the established Federal rule, for which the following reasons were given in Am. Cereal Co. v. Petijohn, 70 Fed. 276: Showalter, Circuit Judge. "This is a bill in chancery filed originally in the superior court of Cook county. The complainant is a corporation organized and doing business in Ohio. The defendant, a Minnesota corporation, having removed the cause to this court by a special appearance for that purpose in the state court, thereupon filed its motion in this court to quash the sheriff's return of service, on the ground that the person named in said return as the agent of defendant was not, in fact, the defendant's agent or employe, within the sense of § 4, c. 110, Rev. St. Ill., relating to the service of process on corporations. Said motion is in writing, and defendant proposes to support the same, and make out its denial of said agency or employment—in other words, to try the question—by affidavits. Complainant now moves to strike said motion so made by defendant from the files, on the ground that said matters cannot be tried or determined, against the objection of complainant, otherwise than by plea in abatement. In support of this position, complainant's counsel cites decisions by the supreme court of Illinois, and one, at least, by a learned federal judge, wherein the state ruling is followed. I find, however, that the practice of making the question by motion, and not by plea, prevails quite generally in the federal courts; and this, I conclude, upon reflection, is the correct practice. The determining consideration is that the matter at issue, however it may result, will not end the suit,—if found against the defendant, the defendant is in court and must plead; if in favor of the defendant, the return on the writ is vacated or quashed, and the suit remains pending,—whereas a plea, either in abatement or in bar, if made out by proof, puts an end to the proceeding. The view that a motion to be determined on affidavits is the proper practice in such cases is sustained by English decisions. Hemp v. Warren, 2 Dowl. (N. S.) 758; Preston v. Lamont, 1 Exch. Div. 361." But a plea in abatement is used in a number of the states. See Greer v. Young, 120 Ill. 184.

(c) *Amendment.*

SHENANDOAH V. R. R. CO. v. ASHBY.

86 Virginia, 232. [*1889.*]

LEWIS, P., delivered the opinion of the court.

It appears from the record, that on the 4th of September, 1874, Thomas N. Ashby instituted an action of debt in the said court against the Shenandoah Valley Railroad Company for the sum of $5,231.90 and $11.90 costs, upon the transcript of a record of a judgment which he had previously recovered against the said company in one of the courts of West Virginia. On the original summons sued out in the action, return was made by John T. Lovell, a deputy of L. Leach, sheriff of Warren county, as follows:

"Executed the within summons in debt on September 5, 1874, upon M. B. Buck, one of the directors of the Shenandoah Valley Railroad Company, by delivering to him a copy thereof. John T. Lovell, D. S., for L. Leach, S. W. C."

At the ensuing October term a judgment by default was rendered for the plaintiff for the sum claimed in the declaration, which judgment was several years afterwards asserted by the trustees of the plaintiff, the defendants in error here, as a lien upon the property of the defendant company, in a certain chancery suit pending in the Circuit Court of Roanoke city, wherein the Fidelity Insurance Trust and Safe Deposit Company was plaintiff, and the said railroad company was defendant. But the claim was rejected on the ground that the judgment was void, because there had been neither service of process upon, nor voluntary appearance by, the defendant in the action wherein the judgment was recovered. Subsequently the said trustees, after due notice, to-wit, on the 20th of October, 1887, moved the said Circuit Court of Warren county, to permit the said return to be amended, which motion was granted, and the return was accordingly amended by the said Lovell so as to read as follows:

"Executed the within summons in debt on September 5, 1874, upon M. B. Buck, one of the directors of the Shenandoah Valley Railroad Company, by delivering to him a copy hereof, in the

county of Warren, Virginia, in which county he resided at the time. John T. Lovell, D. S., for L. Leach, S. W. C."

The defendant company, the plaintiff in error here, complains of this action of the Circuit Court permitting the return to be amended, and the principal ground of its complaint is that, as the original return does not show that the summons was served in conformity with the provisions of the statute relating to the service of process in such cases upon the officers of a corporation, the service was without legal effect, and consequently the judgment founded upon it is void and cannot be validated by amendment of the return.

There is no doubt that the original return is defective, and does not of itself show that the defendant company was legally brought before the court, since the statute expressly enacts that service of process in such a case upon an officer of a corporation shall be in the county or corporation in which he resides, and that "the return shall show this, and state on whom and when the service was; otherwise the service shall not be valid." Code 1873, Chap. 166, § 7; Code 1887, § 3227.

It must therefore be conceded that, unless leave to amend the return was rightly granted, the judgment is void. Barksdale v. Neal, 16 Gratt., 314; 4 Minor Inst., 532. Without the amendment the record presents a case, not of a defective service merely, but of no service at all. In other words, it presents the case of a judgment rendered by a court without having acquired jurisdiction over the defendant, which is simply a nullity. The rule that a court of general jurisdiction, acting within the scope of its authority, is presumed to act rightly, and to have jurisdiction to render the judgment it pronounces, until the contrary appears, applies only as to those matters concerning which the record is silent; nor can it operate in a case like the present to supply jurisdictional facts which the return, according to the statute, must show affirmatively. Harris v. Hardeman, 14 How., 334; Settlemier v. Sullivan, 97 U. S., 444; Richards v. Ladd, 6 Sawyer, 40; Dorr v. Rohr, 82 Va. 359.

We are of opinion, however, that the Circuit Court did not err in permitting the return to be amended, and that, viewing the case in the light of the amended return, the judgment is valid and unassailable. The case is not within the principle that proceedings which are void *ab initio* cannot be rendered valid by amendment, for here the effect of the amendment was not to

confer jurisdiction upon the Circuit Court, but only to perfect the proof of the jurisdiction which it had previously acquired, but of which the evidence prescribed by the statute was wanting. In other words, the amendment, by relating back to the original return and becoming, in effect, a part of it, shows, in the prescribed form and manner, that the defendant company was duly served with process, and hence had notice and an opportunity to be heard, which are essential requisites to the jurisdiction of all courts.

The extensive power with which every court is ordinarily clothed to permit an amendment of a return of its own process, whether original, *mesne*, or final, for the correction of a casual and honest mistake or omission, is not affected by the statute above referred to, and may be exercised in all cases, where it exists at all, as well after judgment as before. In some cases it has been exercised even to the extent of taking away altogether a cause of action growing out of the original return, and even though a suit or motion founded on the original return was pending at the time. And it makes no difference that the officer by whom the return was made has gone out of office or is dead. There is no specific limitation of time within which the power may be exercised, although after a considerable lapse of time, it should be exercised with caution, and in no case ought it to be exercised, unless the court can see that it will be in furtherance of justice.

In a proper case, however, leave to amend, so as to make the return speak the truth, ought to be and usually is, liberally granted, and when the amendment is made, the same effect is to be given to the return, as amended, as though it had at first been put in its present form. In other words, "the amendment takes effect by relation, and operates as if made at the same time as the original return." Freem. Executions, §§ 359, 360; 4 Min. Inst., 839; Stone v. Wilson, 10 Gratt. 529; Walker v. Commonwealth, 18 Id. 13, 51; Richards v. Ladd, 6 Sawyer, 40; Stotz v. Collins, 83 Va. 423, and cases cited.

This being so, it follows that the objection founded upon the form of the original return cannot be sustained. Nor is the position maintainable that the amendment operates to the prejudice of certain creditors of the defendant company, whose debts are secured by mortgages executed subsequent to the rendition of the judgment in October, 1874.

There are cases which hold, and we do not question the doctrine, that an amendment of a return will not be permitted to affect injuriously the rights of third persons, which have attached in the meantime, and which were acquired upon the faith of the verity of the original return. But the present is not a case of that class. The judgment was duly docketed, and there is nothing in the record to show that, when the mortgages were executed, the judgment was not supposed to be valid. At all events, the liens were acquired subject to the right of the plaintiff in the judgment to have the record perfected, as has been done.

The order permitting the amendment must therefore be affirmed with costs.[1]

CHICAGO PLANING MILL CO. v. MERCHANTS' NATIONAL BANK.

97 Illinois, 294. [*1881.*]

Writ of error to the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

On June 10, 1876, defendant in error sued out a summons against the plaintiff in error, which is a corporation having its place of business in Cook county, Illinois. The summons was returned by the sheriff with this return:

"The president of the within named company not being found in my county, served this writ by reading and delivering a copy thereof to William H. Jenkins, secretary of said company, this 13th day of June, 1876.

"FRANCIS AGNEW, Sheriff.

"By Walter, McDonald, Deputy."

On July 6, 1876, the court found that "due personal service of process of summons issued in said cause has been had on defendant, etc., that defendant made default," etc., and gave judgment by default for $4,052.66.

On August 15, 1877, the plaintiff below having been notified and being in court, the defendant being present by its attorney,

[1] See Ins. Co. v. Wolf, 9 Biss. 285, *ante* p. 56; Spellmeyer v. Goff, 112 Ill. 29 (amendment sixteen years after judgment).

the sheriff asked leave to amend his return upon the summons in accordance with the facts. To show the reason of doing so, and why leave should be granted, he filed the affidavit of Walter McDonald, the deputy sheriff who made the service and return and who made affidavit that he served the summons in accordance with the directions written in pencil upon the said summons; that at the time he served said summons and made said return he did not personally know that Jenkins was secretary of said company, defendant. He did not know who was the president of said planing mill company, that he made no inquiry as to who the president was, and that he made no attempt to find said president. The return upon said summons, in so far as it implies that the president of said planing mill company could not have been found in Cook county, is incorrect, and was made by inadvertence. He made the service upon the person he was directed to serve, and made no attempt to serve any one else. He also filed the affidavit of A. C. Hesing, that he was at the time president of the company, defendant, and that he was continuously in the city of Chicago, at his office or residence, during the lifetime of the summons; also, that Wm. H. Jenkins was not the secretary of the company at the time of the service, but that Washington Hesing was such secretary. Also the affidavits of Washington Hesing and Wm. H. Jenkins, to the fact that Jenkins had resigned his position as secretary of the company more than a month before the summons was issued, and that at the time of the service Washington Hesing was secretary, and not Jenkins.

The plaintiff below resisted the application of the sheriff to amend, and filed the affidavit of Alfred B. Mason, its attorney.

The court granted leave to amend the return, and the sheriff afterwards amended the return so as to read as follows:

"By leave of court the above return is stricken out and amended in accordance with the facts, so as to read as follows: Served this writ by reading and delivering a copy thereof to William H. Jenkins, by direction, as secretary, this 13th day of June, A. D. 1876.

"FRANCIS AGNEW, Sheriff.

"By Walter McDonald, Deputy."

Upon this record the plaintiff in error comes into this court and assigns for error that the court erred.

1. In finding that the defendant had due personal service of the summons.

2. In ordering that the default of defendant be taken and entered.

3. In rendering judgment in favor of the plaintiff against the defendant as in default, and asks that the judgment be vacated.

Mr. Justice SCHOLFIELD delivered the opinion of the court:

This case was considered by us at our September term, 1877, and an opinion was filed, and judgment rendered thereon, subsequently, in vacation. Planing Mill Co. v. National Bank, 86 Ill. 587. By inadvertence the judgment was made to affirm the judgment of the Superior Court, when it was in reality intended to affirm only an order of that court allowing an amendment of the sheriff's return to the summons, and to reverse the judgment of the Superior Court.

Upon having our attention called to this mistake, we, of our own motion, ordered a rehearing of the cause; and we have heard additional arguments on the question of whether it was proper to allow the amendment to be made to the sheriff's return to the summons.

The question has been thoroughly discussed on both sides, and we have given such careful and deliberate consideration to it as we have deemed necessary to a correct conclusion.

That the return, as originally made, was sufficient, and that as amended, it is insufficient to sustain the judgment, is fully shown by the former opinion.

In the earlier cases in this court it was held the Circuit Court may authorize a sheriff to amend his return, either before or after the rendition of a decree or judgment, and this, too, without notice to the opposite party of an intention to apply for leave to amend. Montgomery v. Brown, 2 Gilm. 581; Moore v. Purple, 3 id. 152; Morris v. Trustees, etc., 15 Ill. 266; Johnson v. Donnell, id. 97; Turney v. Organ, 16 id. 43; Coughran v. Gutcheus, 18 id. 390; Dunn v. Rodgers et al., 43 id. 262; Hawes v. Hawes, 33 id. 286; Toledo, Peoria and Warsaw Railroad Co. v. Butler, 53 id. 323.

In O'Conner v. Wilson, 57 Ill. 226, this doctrine was, however, in part overruled and it was there said: "The true rule of practice, upon much and mature reflection, we think, should

only permit such amendments as a matter of course, and without notice, during the term at which the cause is determined."

Since then it is held amendments may be made by the sheriff to his return after the expiration of the term at which the cause is determined, only upon notice to all parties interested. National Ins. Co. v. Chamber of Commerce, 69 Ill. 22; Mass. Mut. Life Ins. Co. v. Kellogg, 82 id. 614; Barlow v. Standford, id. 298.

In each of the foregoing cases and so far as we have been able to discover in all the cases hitherto decided by this court, in which the sheriff has been permitted to amend his return after judgment, the amendment has been in *affirmance* of judgment; and the question we are now to consider is, was the Superior Court authorized to allow an amendment, which, instead of being in affirmance of judgment, creates such error as necessitates it reversal by this court?

Under the English statutes and decisions thereon no amendment was admissible save in affirmance of judgment. Blackamoer's Case, 4 Coke's R., part 8, p. 452, side p. 156a; 1 Tidd's Practice (4th Am. ed.), 696; Wooden & Hazel's Case, 1 Leonard, 134; Thompson v. Crocker, 1 Salkeld, 49; Walker v. Slackoe, 5 Modern, 69. And this seems to be the ruling in every state of the Union where the question has been directly the subject of adjudication. Stewart v. Springer, 45 Mo. 113; Kitchen v. Reinsky, 42 id. 427; McClure v. Wells, 46 id. 311; Grower v. Smith, 49 id. 318; White River Bank v. Downer, 29 Vt. 332; Davis v. Putnam, 5 Gray, 321; Hopkins v. Busch, 3 Ga. 222; Moyer v. Cook, 12 Wis. 335; Newhall v. Provost, 6 Cal. 85; Powell v. Commonwealth, 11 Gratt. 822; Dorsey v. Pierce, 5 Howard (Miss.), 173; Hughes v. Lapice, 5 Smedes & Marshall, 451; Englis v. Furness, 3 Ab. Pr. Rep. 82; Gasper v. Adams, 24 Barb. 287.

But counsel contend that the decisions in England and in the other states, bearing upon the question, depend so much upon matters of local practice, and special statute, that they are not of controlling authority here; and they say that the fourth section of our statute of "Amendments and Jeofails" expressly authorizes the amendment of sheriffs' returns, according to the truth, whether that be in affirmance of judgment, or to produce error therein.

We can not concur in this view. A statute allowing such

amendments would, in our opinion, be a most dangerous one to the stability of judgments, and we shall not assume that the legislature intended so to enact, in the absence of phraseology admitting of no other reasonable construction.

The first section of our statute of "Amendments and Jeofails" empowers the court in which an action is pending to "permit amendments in any process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be just at any time before judgment rendered therein." The word "return" does not occur in this section.

The second section includes "returns" and authorizes their amendment after judgment, but then only in *affirmance* of judgment. It is as follows:

"After judgment rendered in any cause, any defects or imperfections in matters of form, contained in the record, pleadings, process, entries, *returns* or other proceedings in such cause, may be rectified and amended by the court *in affirmance* of the judgment, so that such judgment shall not be reversed or annulled." * * *

The fourth section is:

"All returns by any sheriff or other officer, or by any court or subordinate tribunal to any court, may be amended in matters of form, or according to the truth of the matter, by the court to which such returns shall be made in its discretion, as well *before* as *after* judgment."

It is to be kept in mind that no authority is given in either of the preceding sections in express terms to amend *returns before* judgment. It was thought necessary in the second section, although the word *process* had been previously used, to expressly name "returns" as being amendable—and it is but fair to assume that the same idea obtained in the enactment of the first and fourth sections—that is, that to embrace *returns* they must be specifically named—and, not having been named in the first section, nor their amendment provided for *before* judgment in the second section, it was necessary to confer this power of amendment in the fourth section.

The concluding words of the fourth section are strongly confirmatory of this view. They are, "as well *before* as *after*," from which the only reasonable implication is provision for amendment, "*after*," already exists, but it is necessary now to

confer power to amend *before*. The words are not equivalent in meaning to "*either before or after*," but clearly imply the "conferring of a like power to do *before* that which there is already power to do *after*."

This view leaves the second section only applicable to amendments to returns after judgment; and, as has been seen, they can, by virtue of it, only be made in *affirmance* of judgment.

The order of the court allowing the amendment to the sheriff's return was erroneous, and it is reversed; but the judgment below must be affirmed.

Judgment affirmed.

CRAIG, J. I do not concur. In my opinion the fourth section of the statute cited in the opinion authorized the amendment of the sheriff's return.[1]

HALL v. GRAHAM.

49 Wisconsin, 553. [*1880.*]

Appeal from the Circuit Court for Grant County.

The verified complaint in this case alleges that defendant was indebted to plaintiff in the sum of $490.40, "balance due upon a mutual and open account current," and demands judgment against him for that amount with interest thereon from January 1, 1879, and for costs, etc. Annexed to the complaint on file is the summons in due form, except that the sum for which judgment would be taken (exclusive of interest and costs) was left blank, and that the postoffice address of the attorney subscribing it was not given. Upon the summons is indorsed an affidavit of "Samuel Morris, Constable," which states that on the 14th of January, 1879, the affiant "served the within summons and complaint on the defendant within named, by delivering to him personally a true and correct copy thereof, at Potosi in said Grant county," and that the affiant personally knew the said Graham to be the defendant therein named. On the 11th of February, 1879, plaintiff's attorney filed an affidavit of no an-

[1] See Stewart v. Stringer, 45 Mo. 113, where the court permitted an amendment to be withdrawn, thus restoring the original defective return.

swer or appearance by the defendant. Thereupon it was referred to the clerk of the court to take proof of the plaintiff's demand, and upon the coming in of his report the court rendered judgment for the plaintiff as demanded. Defendant appealed from the judgment.

OBTON, J. The Circuit Court had no jurisdiction to render the judgment appealed from, because there was before the court no such proof of the service of the summons as the statute requires. Subd. 2, § 2642, R. S.; Matteson v. Smith et al., 37 Wis. 333. The affidavit of the person who is alleged to have served the summons, and which constitutes the only return of such service, fails to state that a copy of the summons was left with the defendant. The motion papers for an amended return were submitted after the decision of this case; but it was too late to make such an amendment of the record as would cure the error, after the appeal. The defect was jurisdictional and could not be cured. Proof of the service of the summons is a condition precedent or prerequisite to the rendition of a judgment by default.[1]

By the court. The judgment of the Circuit Court is reversed, with costs, and the cause remanded for further proceedings according to law.

PARK LAND CO. v. LANE.

106 Virginia, 304. [*1906.*]

BUCHANAN, J., delivered the opinion of the court.

The first error assigned is to the refusal of the court to permit the return upon the original summons against the appellee to be amended upon the appellant's motion.

When the summons was returned and filed the return on it became a matter of record and could not be amended without permission of the court. Goolsby v. St. John, 25 Gratt. 146, 160, 4 Minor, 937; Stotz v. Collins & Co., 83 Va. 423, 2 S. E. 737; Freeman on Executions, § 358. This permission is usually

[1] Compare: Blaisdell v. Pope, 19 Mo. 157, allowing an amendment pending motion to vacate the judgment.

granted upon proper application made in the cause in which the writ or summons issued. But it is not granted as a matter of course, but only in the furtherance of justice and in the exercise of an enlightened discretion after notice to the opposite party. Code, § 3451; 3 Freeman on Executions, § 358; Shenandoah Valley R. Co. v. Ashby's Trustees, 86 Va. 232, 9 S. E. 1003, 19 Am. St. Rep. 898.

The object of the amendment of a record, as Mr. Freeman says, whether made by the court in the entries on its minutes, judgments or other proceedings, or by the sheriff in the history of his proceedings as stated in his return, is, or always should be, to obtain a record which shall speak the exact truth. A court will not suffer a proposed amendment to be made without first being satisfied that it is true. 3 Freeman on Executions, *supra;* Bagley, Petitioner, 132 Mass. 457. The court therefore properly permitted the parties to introduce evidence as to the question whether or not, when the deputy-sheriff delivered a copy of the summons to the wife of the appellee, he explained its purport to her.

The only persons who appear to have been present at that time were the deputy-sheriff and the appellee's wife. The officer, in his examination in chief, testified positively that when he delivered the process to the appellee's wife he did explain its purport to her, but on his cross-examination he stated that to the best of his recollection he did so, but admitted that a few days before he was testifying he had made an affidavit in which he had stated that he did not recollect whether he had or not. The appellee's wife testified positively that the officer did not give her information as to the purport of the summons, but only asked her to hand it to her husband when he returned home. The other two witnesses knew nothing as to what took place when the summons was delivered except what they were told. The sheriff testified that his deputy told him a few days after it was delivered that he had explained its purport. The appellee, on the other hand, testified that his wife told him when she gave him the process, that the officer did not tell her what the paper was, but only asked her to hand it to her husband when he returned home.

If this hearsay evidence was admissible, and it is by no means clear that it was, it is of little value. The trial court saw the witnesses, their manner of testifying and their bearing. The

number of witnesses on each side were the same. Their evidence was in direct conflict. The officer's return and his affidavit to some extent lessened the weight of his testimony, and the court might very properly have held, as it did, that it was not satisfied that the proposed amendment was true, and therefore refused to permit it to be made. Indeed, the evidence was of such a character that no matter which way the trial court decided the question, an appellate court would not feel justified in reversing its action.

It is further insisted that the court erred in holding, upon the facts disclosed upon the motion to amend, that the summons had not been duly served on the appellee.

There were two ways of serving process upon the appellee—one by personal service and the other by substituted or constructive service. Although the appellee received from his wife the copy of the summons left with her for him a few days afterwards, in ample time to have made defense to the suit, and from that copy actually learned, or if he had read it carefully might have learned, its contents, the service was not a good personal service. Service upon the wife of appellee was not service upon him. It was not served in the manner required by law to be good personal service, and besides the appellee did not receive it until after the return day. The service upon appellee's wife was a substituted service, and no proposition of law is better settled than that where constructive service of process is allowed in lieu of personal service, the terms of the statute by which it is authorized must be strictly complied with, or the service will be invalid. Staunton Building, etc., Co. v. Haden, 92 Va. 201, 205, 209, 23 S. E. 285, and authorities cited. Crockett's Admr. v. Etter, etc., 105 Va. 679, 54 S. E. 864.

CHAPTER II.

JUDGMENTS BY DEFAULT.

SECTION 1. WHEN ALLOWED.

COLLINS v. PAGE.

Style, 124. [*1649.*]

A plaint was entered in the Court of Plymouth against Page for three-score pounds, and a pone taken out against his goods, and upon this a default, and thereupon another pone issued out to attach the defendant's goods; and the defendant at three other courts successively makes default, and upon the fourth default judgment was given against him; whereupon defendant brings a writ of error in this court to reverse the judgment, and assigns for error, that here is a judgment given before any appearance, which cannot be, but in this case the goods attached are only forfeited for the default made by the defendant's non-appearance. The counsel on the other side desired time to answer the exception. ROLL, Justice: The custom upon which this judgment is given is not reasonable. Therefore if you answer not the exception Tuesday next, the judgment shall be reversed.[1]

GRIGG v. GILMER.

54 Alabama, 425. [*1875.*]

Action by attachment and service by publication; defendant filed a plea in abatement for insufficiency of the affidavit; at the

[1] "The 12 G. 1, c. 29, and 5 G. 2, c. 27 (to which the 2 W. 4, c. 39, s. 1 and 16, refers), provide that if the defendant do not duly appear, then the plaintiff may upon *affidavit* made and *filed* in the proper Court of the *personal service* of the process, *enter an appearance for the defendant*, and proceed the same as if the defendant himself had appeared." 3 Chitty, Practice, 289.

next term the following judgment was entered: "This day come the parties by their attorneys, and the defendant withdrawing his plea, and saying nothing in bar or preclusion of the plaintiff's demand, and it appearing to the satisfaction of the court, etc., it is therefore considered by the court that the plaintiff recover of said defendant her demand in the complaint mentioned, but the same being uncertain, a writ of inquiry is awarded to ascertain the same." On defendant's motion this entry was amended so as to convert it into a default for want of appearance.[1]

BRICKELL, C. J. An appearance is a submission to the jurisdiction of the court, in obedience, or in answer to process. Though we have a rule of practice, prescribing particularly the mode in which the appearance shall be entered, and thereby made known to the court and to the opposing party and counsel, the rule is but seldom, if ever, observed. The entry on the margin of the dockets of the court of the name of an attorney, opposite to the name of a party to a suit, is accepted in practice as an appearance for such a party. The consequence resulting from an appearance thus made, may be limited by the steps taken, or the pleadings interposed subsequently. If these refer to, and are for the purpose of vacating an irregular service of process, or for showing to the court there has been no service of process, or for taking advantage of defects in the process on error or appeal, such appearance will not be deemed a general appearance, curing such irregularities or defects. Lecatt v. Salle, 1 Port. 287; Nabors v. Nabors, 2 Port. 162; Wilson v. Outlaw, Minor 196; Lampley v. Beavers, 25 Ala. 534.

A judgment by default is, in our practice, a judgment for the want of an appearance. It is distinguished from other judgments by the recital, "the defendant being called, came not but made default." An appearance in a civil suit at law is purely voluntary. No process can issue to compel it, nor can the plaintiff, in any event, enter it for the defendant. A defendant may decline to make it, incurring no other consequence than an admission of the plaintiff's cause of action, as averred in the complaint, and a judgment against him on such admission. McGehee v. Childress, 2 Stew. 506. The judgment can never be entered

[1] The statement has been condensed.

if there is an appearance, unless the defendant has filed an affirmative plea, and does not subsequently appear to sustain it. If there is an appearance, and a failure to plead, a judgment *nil dicit*, not a judgment by default, must be rendered. Stewart v. Goode, 29 Ala. 476. Or, if the defendant appears, and subsequently withdraws his appearance, making "no further defense," *nil dicit* is the proper judgment. Summerlin v. Dowdle, 24 Ala. 428. So, when there is an appearance, and a motion to quash the summons as irregular, which is overruled and no further defense is made, a judgment *nil dicit* is proper. Eaton v. Harris, 42 Ala. 491. The appearance of the defendant, and the subsequent withdrawal of a plea filed, is properly followed by a judgment *nil dicit*. Kennedy v. Young, 25 Ala. 563.

The plea in abatement filed by the defendant, because of the insufficiency of the affidavit on which the attachment issued, was an appearance; for until an appearance is effected, there can be no pleading. Stephen on Plead., Appendix xxii; 1 Chit. Pl., 427; Stephens v. Arthur, Salk. 544. The judgment on this plea, if in favor of the plaintiff, on issue found, would have been final, leaving nothing more to be done than an assessment of the damages, if the action sounds in damages. Jones & Co. v. Donnell, 9 Ala. 695. If a demurrer had been interposed and sustained, the judgment would have been *respondeat ouster*. Massey v. Walker, 8 Ala. 167. If, on demurrer, or on issue found, the judgment had been for the defendant, it would have been final, that the writ be quashed, and the defendant go hence, and recover costs. A plea on which a final judgment may be rendered is, of necessity, an appearance.

It is insisted, however, for the appellee, the withdrawal of the plea in abatement remitted the cause to the condition in which it was before the plea was filed. We cannot assent to the proposition. It is not in accordance with our former decisions, and would operate to the prejudice of the plaintiff, who, by its withdrawal, has been deprived of the opportunity of testing the truth or sufficiency of the plea, and obtaining a judgment which would have been final, or of *respondeat ouster*, compelling a plea in bar. For no subsequent plea in abatement or dilatory plea could have been interposed. Houck v. Scott, 8 Port. 161. The withdrawal of the plea was the voluntary act of the defendant, which the plaintiff could not prevent. It was either a confession of its insufficiency, or a waiver of the matter of defense it con-

tained. Whether the one or the other the defendant was before the court, and failing to plead further, a judgment for the want of a plea, which is a judgment *nil dicit*, was the proper judgment. That was the judgment originally entered, and in its amendment, so as to convert it into a judgment by default, the court erred. For the error the judgment must be reversed and the cause remanded.

COX v. CAPRON.

10 Missouri, 691. [*1847.*]

McBRIDE, J., delivered the opinion of the court. * * *

The first question presented for our decision is the action of the Circuit Court on the plaintiff's motion for a judgment by *nil dicit*. The reasons assigned in the motion are, first, because there is no sufficient plea to said declaration—the plea of not guilty having been withdrawn; second, because the special plea of said defendant is insufficient in law, and does not contain a substantial defense to the action; and, thirdly, because the said defendant has withdrawn the plea of not guilty, without having pleaded any plea that is sufficient in law or amounts to a substantial defense to the action.

Tidd, in his treatise on practice, 1st vol., 609, says, that judgment by default, which is an implied confession of the action, is either *non sum informatus*, where the defendant's attorney, having appeared, says that he is not informed of any answer to be given to the action; or by *nil dicit*, where the defendant himself appears, but says nothing in bar or preclusion thereof; and the latter judgment, which is the more usual, is either for want of any plea at all, or for want of an issuable plea, after a judge's order for time on the terms of pleading issuably; or where the defendant pleads a plea not adapted to the nature of the action, or which may be considered as a nullity,[1] or is false and vexatious, or not pleaded in due time or in proper manner.

These rules laid down by Tidd do not apply to the case at bar;

[1] For the case of a plea not adapted to the action, or a plea in abatement not verified, see, 1 Tidd Prac. 8 Eng. Ed. p. 610-11.

for in this case a plea suited to the action was put in in proper time,[2] and replied to by the plaintiff, who could not thereafter, with any legal propriety, ask the court for a judgment by *nil dicit*. If the reasons existed which are set forth in his motion, his proper course would have been to ask leave of the court to withdraw his replication to the plea of justification, and demurred to it.[3] Not having done this, whether the plea was sufficient or not, the court did right in overruling his motion.

BLEWITT v. MARSDEN.

10 East, 237. [*1808.*]

To an action against the acceptor of a bill of exchange the defendant pleaded a sham plea of judgments recovered in the Court of Piepoudre in Bartholomew fair, which were framed in terms obviously denoting fictitious proceedings; and Parke for the plaintiff in consequence applied for a rule to show cause why the plaintiff should not be at liberty to sign interlocutory judgment in this case as for want of a plea, (treating it as a nullity; it being palpably and upon the face of it a sham plea,) and why the defendant's attorney should not pay the costs occasioned by the plea and of this motion. And on cause shown by the Attorney-General, he did not attempt to justify what had been done, but endeavored to excuse the pleader and the defendant's attorney, upon the ground of their having been misled by an improper practice which had crept in of putting such sham pleas upon the files of the court. He observed that it might be difficult to prevent altogether the practice of putting in

[2] It has been held that a plea filed out of time cannot be ignored, but must be stricken from the files before a judgment of *nil dicit* can be entered. Pett v. Clark, 5 Wis. 198; but see Flanders v. Whittaker, 13 Ill. 707, holding that a demurrer was properly ignored where filed without leave.

[3] A judgment by default can not be entered pending a demurrer, or a motion attacking the jurisdiction or the pleadings, but this rule does not apply to other classes of motions, e. g., a motion for the production of books at the trial, Hill v. Meyer, 47 Mo. 585, or a motion for security for costs, Fears v. Riley, 148 Mo. 60, or a motion to vacate an arrest on civil process, Phillips v. Kerr, 26 Ill. 213.

sham pleas of judgment recovered in the usual form; and he would not discuss the different merits of the respective forms of pleading them.

The court said that there might be occasions where they would not enter into any question as to the truth of a plea of judgment recovered, pleaded in the usual form, upon motion, but await the time for producing the roll when such a plea would be regularly disproved; but they expressed great indignation against the abuse which had grown up of late and was continually increasing, of loading and degrading the rolls of the court with sham pleas of this nonsensical nature, making them the vehicles of indecorous jesting; by which it sometimes happened that the time of the court, which ought to be better employed, and was sufficiently engaged with the real business of the suitors, was taken up in futile investigations of nice points which might arise on demurrer to such sham pleas. And therefore in order effectually to put a stop to this practice in future, they made the rules absolute in this and several other causes wherein the same form of plea had been filed.[1]

MANLOVE v. GALLIPOT.

2 Illinois, 390. [*1837.*]

LOCKWOOD, Justice, delivered the opinion of the court:

This was an action of ejectment brought in the Schuyler Circuit Court. The defendants filed their plea of not guilty, on which the plaintiff joined issue. Subsequently to the joining issue on the plea of not guilty the plaintiff had the defendants called, and upon their not appearing, had their default entered, and judgment that the plaintiff recover his term and costs of suit. This was clearly erroneous. After issue is joined, the plaintiff, to obtain judgment, must proceed and try his cause by a jury, in the same manner as if the defendants had answered to their names when called.[1]

[1] For the case of a plea merely false, see Idle v. Crutch, 1 Chitty Rep. 525 note.

[1] Defendant's pleas can not be stricken out for failure to appear at the trial, Cooper v. Buckingham, 4 Ill. 456.

The judgment of the Circuit Court is reversed with costs, and the cause remanded with directions to the court below to set aside the judgment by default.

MILLNER v. MILLER.

4 Bibb. (Ky.), 431. [*1816.*]

Opinion of the court by Chief Justice BOYLE.

This was an action of debt upon an obligation for the payment of money.

The defendant appeared and pleaded, 1st, payment; 2ndly, a setoff. And issues being thereupon joined, the cause was continued until the next term of the court; when the defendant failing to appear, judgment was taken against him by default, and a writ of inquiry awarded, which being executed a final judgment was entered for the plaintiff. To reverse which, the defendant prosecutes this writ of error with supersedeas.

The errors assigned question the correctness of taking judgment by default, and awarding a writ of inquiry, when issues were joined in the cause.

Where the defendant pleads a negative plea upon which issue is joined, it is no doubt erroneous to take judgment by default, or to swear the jury to inquire of damages. It was accordingly so ruled by this court in the case of Williams v. Cheek (Pr. Dec. 76).

But the law appears to be well settled, if the defendant pleads an affirmative plea, and afterward makes default, that judgment may be given against him for the default. As in an action of debt, if the defendant pleads an acquittance or release, and after makes default, judgment shall be entered upon the default, because the duty is acknowledged (7 Vin. Abr. 475). So in replevin, if the defendant avows, and afterward makes default, judgment shall be thereupon given for damages; because the taking and detention are acknowledged. (Ib.)

In this case both the pleas of the defendant in the court below are in the affirmative. They admit the obligation on which the action is founded, but contain matter in discharge of it.

It was incumbent, therefore, on the defendant to have sus-

tained his pleas by proof, and not having appeared for the purpose on the day given him by the court, it was strictly correct to enter judgment against him for his default.

Judgment affirmed.

SECTION 2. EFFECT.

GREEN v. HEARNE.

3 Term Rep., 301. [*1789.*]

This was an action on a bill of exchange against the defendant as acceptor; and the declaration stated in the usual form that he did accept, etc. The defendant suffered judgment to go by default in Hilary 1787; and, at the execution of the writ of inquiry in the last vacation, the bill of exchange was produced, but it did not appear to have been accepted; and no other evidence was produced. The jury having given a verdict to the amount of the bill, a rule was obtained at the beginning of the term to show cause why the judgment, and the writ of inquiry executed thereon, should not be set aside; the former on an affidavit of merits, namely, that in fact the defendant had not accepted, and on the ground of negligence in the defendant's attorney; the latter, for insufficient proof.

Lord KENYON, Ch. J., said, as to the first ground, that the defendant should have applied sooner to set aside the judgment. And, with respect to the other objection, that the bill produced did not correspond with that declared on, he observed that it might have been accepted, though not in writing; and that, by suffering judgment to go by default, the defendant had admitted the cause of action to the amount of the bill.

BULLER, J. When a defendant suffers judgment to go by default, he admits the cause of action. And thus far an action on a bill of exchange, and an action for money had and received, are alike; but beyond that there is no similarity. For, in the latter, the defendant only admits something to be due; and, as the demand is uncertain, the plaintiff must prove the debt before the jury. But, in the former, as the bill of exchange is set out on the record, the defendant, by suffering judgment to go by default,

admits that he is liable to the amount of it:[1] here then the defendant has admitted that he did accept the particular bill of exchange set out in the declaration; and the only reason for producing it to the jury on executing the writ of inquiry, is to see whether or not any part of it has been paid. (See Bevis v. Lindsey, 2 Str. 1149.)

Rule discharged.

RANDOLPH v. COOK.

2 Porter (Ala.), 286. [*1835.*]

Mr. Chief Justice SATFOLD: The action was assumpsit, brought by the defendants in error, on a promissory note drawn in their favor by Randolph. The note bears date on the 5th of June, 1832; is payable one day after date, and the writ was issued and served on the 6th of the same month. The declaration contains one count only, which is on the note in the usual form, and is captioned as of June Term of the County Court, 1832, this being the return term. At the same term, T. J. Abbott, Esq., an attorney of this court, entered a formal appearance for the defendant, on the Appearance book, in the manner prescribed by the rule of court for entering appearances of record; but no plea appears to have been filed. At the succeeding December term, the record states, that the parties came, by their attorneys; and for want of a plea, judgment was rendered by default; to reverse which the defendant below prosecutes this writ of error.

He assigns, as ground of error, that no cause of action is shown in the plaintiff's declaration, inasmuch as the note declared on was not past due when the action was brought.

The plaintiff in error insists that he had the whole of the 6th of June to pay the note, and that no action could be legally brought till the 7th, fractions of days not being recognized by the law. This position is not contested by the counsel for the

[1] The writ of inquiry appears to have been unnecessary. Shepherd v. Carter, 4 Term Rep. 275.

defendant in error; therefore, it is unnecessary to examine it. But admitting the principle, that the suit was prematurely brought, it is insisted that advantage could only have been taken of it, on or previous to the trial below, and that the objection has been waived. This is the only question necessary to be considered.

A rule, which appears to be well sustained by numerous authorities, and salutary in principle, is that matter merely abateable, where the defendant has had legal notice of the process, must be taken advantage of by plea; else the objection is considered to have been waived. This, I understand to be the rule which has uniformly prevailed in this court, and that it holds equally, whether the abateable matter be apparent on the writ, or arises from extrinsic circumstances. If there be a misnomer of plaintiff or defendant, the process having been duly served on the true defendant, and a good declaration filed, for a cause of action corresponding with that indicated by the writ, the exception can only be taken by plea, within the time allowed for pleading. An objection to the service of the writ, whether it relates to the officer making it, or the time or manner of execution, has uniformly been considered to be waived by the regular appearance of the defendant, and suffering a judgment by *nil dicit*, or by pleading to the merits of the action. Even a judgment by default, where there has been due service of the writ, and there is no error apparent on the record, is an admission of the cause of action as alleged in the declaration. The premature commencement of this suit is the only objection to it. After having been regularly served with the writ, the defendant, by his attorney, entered his formal appearance at the return term, and at the trial term, suffered judgment by default. I have no hesitation in saying, that in cases where the record does not disclose the fact that the suit has been prematurely commenced, the exception is allowable on motion to exclude the evidence: in such cases this would be the only means of defence. * * *

The only difficulty I have felt in this case has been to determine whether the appearance of the defendant, and the judgment by default did not cure, or constitute a waiver of the objection. In reference to this principle, respectable authority has maintained that a judgment by default cures only such defects in the declaration as would have been aided by a general demurrer—that the

effect of a demurrer to the pleadings is, that it reaches back through the whole record, and attaches ultimately upon the first substantial defect in the pleadings, on which ever side it may have occurred. It is also said that the objection, "that the right of action had not accrued at the commencement of the suit, may be pleaded in abatement; as where an action on a contract is commenced before the time appointed for the performance;" but that this plea is seldom necessary; because, if the defect appear upon the face of the declaration, it is fatal on demurrer; and if not it may generally be taken advantage of on the trial. The remarks of Judge GOULD do not fully embrace the particular point under consideration; where the defect does not appear in the declaration without reference to the capias *ad respondendum*, but appears from the latter; and where there is no plea to the merits, nor any exception taken in the court below. It is clear, however, that the issuance of the capias, with us, is the commencement of the suit. From the other authorities to which I have referred, it appears, that if the defect appears from the pleadings, and has not been waived by the defendant's plea, it is available in error; nor do those cases limit the inspection of the revising tribunal to the pleadings in their technical acceptation, but seem to consider the objection fatal, if it appear in any part of the record, and to regard the process by which the suit is commenced as matter of record, for ascertaining the time.

Several other early English cases are to the same effect. In Ward v. Honeywood (Doug. 61), it appeared from the plaint that suit was commenced before the maturity of the note, which was the cause of action. The Court of King's Bench, held, that the plaint was to be considered as the original and commencement of the action, and the defect thus appearing of record, the exception was available in error. There are various other decisions to the same effect. Hence I conclude, that the judgment must be reversed.[1]

[1] But some statutes of Jeofails make a default operate much in the same way as a verdict in curing defective pleading. Winn v. Levy, 2 How. (Miss.) 902.

BOWDELL v. PARSONS.

10 East, 359. [*1808.*]

The declaration set out a contract by which the defendant was to deliver certain hay to plaintiff on request as he should want it, and alleged a failure to deliver, although requested so to do, without stating any time or place. After judgment by default and writ of inquiry executed, the defendant moved in arrest because of such omission.[1]

Lord ELLENBOROUGH, C. J. It appears to me that the second count is sufficient to sustain judgment for the plaintiff, as well as the first. The question comes now to be considered by us after the stat. 4 Ann. c. 16 for the amendment of the law; the first section of which enacts "that in all cases where any demurrer shall be joined, etc., the judges shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, or defect in any writ, etc., declaration, or other pleading, etc., except those only which the party demurring shall specially and particularly set down and express as cause of demurrer; notwithstanding that such imperfection, omission, or defect, might theretofore have been taken for matter of substance, and not aided by the stat. 27 Eliz. c. 5: so as sufficient matter appear in the said pleadings upon which the court may give judgment according to the very right of the cause." Now it is admitted, according to what was said by Lord MANSFIELD in Collins v. Gibbs (2 Burr. 899), that this being a motion in arrest of judgment is to be considered exactly the same as if the question had arisen on general demurrer. Then what does the statute say upon the subject: after specifying the want of several matters of form, of which no advantage or exception shall be taken, it proceeds to say that "the court shall give judgment according to the very right of the cause as aforesaid, without regarding any such imperfections, omissions, or defects, or any other matter of like nature, except the same shall be specifically and particularly set down and shown for cause of demurrer." Now is not the omission to repeat a venue (for

[1] Statement of the pleading has been condensed.

it must be always remembered that there is one venue well laid in the declaration) a less material omission than the want of alleging *pro ut patet per recordum,* where a record is pleaded; which is one of the instances specified where the omission shall not be taken advantage of without being specially shown as cause of demurrer; for that is an omission to refer to that by which alone the allegation is to be proved; but here the omission is of that which is mere form. It is said that a request must be alleged: and so it is: but then it is said that it is not duly alleged: the imperfection however consists only in the want of a time and place, where a venue was before laid; an omission by no means of equal importance with several of those instanced in the statute. The case of Bach v. Owen (5 Term Rep. 409), is relied on, as having been decided on this objection since the statute; where Mr. Justice BULLER said, "that the want of a request was a substantial defect in the declaration, and that where it was necessary to allege a special request, the general words, though often requested, would not answer the purpose." There was no judgment however in that case; but leave was given to amend; and the cases referred to in the margin of the report, if cited by him, as supporting that position, are all before the statute of Anne. Another case was cited of Wallis v. Scott (1 Strange, 88), which came on upon general demurrer subsequent to that statute: but there judgment was ultimately given for the plaintiff when the court was full. And though one of the judges in the first instance threw out an opinion, that where a request was by law necessary (which he thought it was not in that instance), the general averment would not be sufficient, but it must be particularly set forth, that the court might judge whether it were sufficient: yet it is to be observed, that the healing operation of the statute of Anne was not presented to the consideration of the court. Nor was it so in the case of Bach v. Owen; for if it had, I think the objection there must have been overruled; because it was not only an objection of like nature, but of less force than several of those stated in the statute. In this case there is an allegation of a request, which it is admitted would be sufficient if time and place were laid with it; and I am of opinion that the want of those since the statute is not a sufficient objection in arrest of judgment.

MAUNSELL v. LORD MASSAREENE.

5 Term. Rep., 87. [*1792.*]

The defendant having suffered judgment by default in an action on a bill of exchange for £200 Irish money, the plaintiff moved to refer it to the master to see what was due for principal, interest, and costs:

Park opposed it on the ground that this was foreign money, the value of which could only be ascertained by a jury.[1] Bagshaw v. Playn, Cro. Eliz. 536: and Rands v. Peck, Cro. Jac. 617; and he observed that this was one of the reasons why this court refused to grant a similar application in Messin v. Lord Massareene, *ante*, 4 vol. 493.

Baldwin, in support of the rule, said, that it would not be more difficult for the master than a jury to ascertain the value of this money. But the court (Lord KENYON, C. J., being absent) said, that there was the same reason for refusing this application that there was in the case of Messin v. Lord Massareene; and they

Discharged the Rule.[2]

TRIPP v. THOMAS.

3 Barnewall & Cresswell, 427. [*1824.*]

Case for words imputing subornation of perjury. Judgment by default. At the execution of the writ of enquiry the plaintiff

[1] Semble, that the Court had the power to assess damages without a jury even in tort cases. See Bruce v. Rawlins, 3 Wilson, 61 (1770), in which it was said by Chief Justice Wilmot on an application to set aside an assessment of damages by a jury. "This is an inquest of office to inform the conscience of the Court, who, if they please, may themselves assess the damages, but I am of opinion we ought not to interpose in this case, which differs widely from the case of stopping the wagon. This is an unlawful entry into a man's house (which is his castle), an invasion upon his wife and family at peace and quietness therein, frightened and surprised by these defendants; who under pretense of information received, and color of legal authority, demand the keys of, and search all the boxes and drawers in the house.

[2] After default in debt on an indemnity bond the damages must be proved.

offered no evidence, but his counsel addressed the jury, and they assessed the damages at £40.

Ludlow now moved to set aside the inquisition, and contended that the jury were not justified in giving damages without some evidence by which they might be guided in fixing the amount; or that the damages should, at all events, have been nominal.

ABBOTT, C. J. I think that we cannot disturb the finding of the jury. The defendant by suffering judgment by default admitted the speaking of the words as alleged in the declaration. It was, therefore, unnecessary to give evidence to that effect. The plaintiff did not produce any evidence in aggravation, it cannot therefore be presumed that the jury were misled, or that they estimated the damages on erroneous grounds.

Rule refused.

STRONG v. CATLIN.

3 Pinney (Wis.), 121. [*1850.*]

Action of assumpsit brought by Albert Catlin against Moses M. Strong.

The summons by which the action was commenced was not sealed with the seal of the court. It was served personally on the defendant. He did not appear, and being in default, the court in term time, without interlocutory judgment having been entered, ordered the clerk to assess the plaintiff's damages, and he reported that he had assessed them at $298.95, and upon his report judgment was given for the plaintiff and against the defendant for that sum and costs, and the defendant brought this writ of error.

LARRABEE, J. The summons by which this action was commenced had no seal; but this was clearly one of those defects provided for in the statute of amendments, and was cured by verdict.

Where the defendant suffers a default to be entered against him in an action of assumpsit, the judgment in the first instance is only interlocutory; and this must be entered before the plaintiff can proceed to have his damages assessed, or to complete his final judgment in the case.

No interlocutory judgment was entered, but a final one, of which complaint is now made. This must be reversed, and the plaintiff can proceed to enter his interlocutory judgment at the next term of the Circuit Court.[1]

Judgment reversed.

SECTION 3. SETTING ASIDE AND OPENING.

DOBBS v. PASSER.

2 Strange, 975. [*1734.*]

The plaintiff signed judgment in ejectment, and before he had lost any trial the defendant applied to set it aside, though strictly regular, upon payment of costs, and taking notice of trial; which the plaintiff refused. And the court being applied to, a distinction was offered between ejectments and all other actions, because the right was not bound, but a new ejectment might be brought. *Sed per curiam*, That distinction held formerly in many instances where it is now exploded, you could not formerly have a new trial as you now may; and great inconveniences may arise from changing the possession, timber may be felled, etc., and as the Common Pleas makes no difference, and we are got into their way in all other actions, it is proper to do it here too.[1] (*Vide Doe ex dem.* Troughton v. Roe, 4 Burr. 1996.)

HART'S ADM'R v. WALKER.

31 Missouri, 26. [*1860.*]

This was an action on a promissory note. On the second day of the return term, a judgment by default for want of an answer

[1] In a number of states the statutes provide for an assessment of damages by the Court unless a jury is demanded. See Par. 59, Ch. 110, Ill. R. S., 1913.

[1] "The Court said that it was never to be done, but where the defendant was to plead to the merits, not to give him the advantage of a nicety in pleading." Forbes v. Middleton, 2 Strange, 1242.

The requirement of a detailed affidavit of merits appears to have originated somewhat later. See Oakley v. Giles, 3 East, 167, *ante*, p. 12.

was taken against the defendants. On the same day and before the adjournment of the court, the defendants moved the court to set aside the judgment by default and for leave to file an answer immediately. The court overruled the motion. There was no bill of exceptions signed by the judge. The term continued more than three days. The defendants appealed to the Supreme Court.

SCOTT, Judge, delivered the opinion of the court.

It appears from the record that the term of the Stoddard Circuit Court, at which the judgment in this cause was rendered, continued for more than two days. The defendants therefore had the whole of the second day on which to plead, even though the cause was set for that day and was called on that day in its turn. The arrangement of the docket could not deprive them of a right conferred by law. Having the whole of the second day on which to plead, a judgment by default could not be taken on that day against the defendants. It could not be taken earlier than the third day. As the judgment by default was not taken regularly, the defendants were entitled to have it set aside without an affidavit of merits. The granting the motion was not a favor, and the court could impose no terms. It was a legal right and they could insist on it as such. After the motion was overruled, the defendants should have filed a bill of exceptions and preserved their motion in it and the action of the court upon it, which should have been signed by the judge. As the matter stands, there being no bill of exceptions, the judgment must be affirmed.[1]

CLOUGH v. MOORE.

63 New Hampshire, 111. [*1884.*]

CLARK, J. The power to set aside, vacate, modify, or amend judgments for sufficient cause, is unquestioned. Adams v. Adams, 51 N. H. 388; Judge of Probate v. Webster, 46 N. H. 518; Bellows v. Stone, 14 N. H. 203. In some form of procedure a party

[1] And so in case of defective service. Norton v. Ry., 97 Cal. 390.

is entitled to relief from a judgment rendered by accident or mistake or through fraud, or in respect to which any fact exists which proves it to be against conscience to execute the judgment of which the party was prevented from availing himself by fraud, accident, or mistake, unmixed with any fault or negligence of himself or his agents. Currier v. Gilman, 55 N. H. 364; Hibbard v. Eastman, 47 N. H. 507; Wingate v. Haywood, 40 N. H. 437. Whether the motion to bring forward these actions and vacate the judgments should be granted, is a question of fact to be determined at the trial term. Bank v. Clement, 58 N. H. 533.

It is contended that the facts upon which the motion is based furnish no sufficient cause for granting it if proved by competent evidence. It is a fundamental principle of the law, that judgment ought not to go against a party without an opportunity to make defence; and judgments rendered without notice are voidable. Gay v. Smith, 38 N. H. 171, 174. Ordinarily it would seem to be sufficient cause for vacating a judgment that it was rendered without notice to the defendant, who, having a sufficient defence, was prevented from making it for want of such notice, without fault or negligence on his part. A party ought not to be permitted to retain the fruits of a judgment to which he is not entitled, neither should he be compelled to submit to a judgment which unjustly concludes his rights without an opportunity to be heard. Such a result can happen only through a defective administration of justice. It is conceded that a judgment obtained by fraud should be vacated, because a party ought not to be permitted to profit by his fraud. How does the fact that a party is free from fault entitle him to retain the benefits of an unjust judgment? To enforce a judgment obtained without notice is no less injurious to the defendant, than to obtain a judgment fraudulently without any attempt to give notice. In either case the defendant is defrauded, and the plaintiff obtains an unjust advantage.

There is no conclusive presumption that a copy or summons left at the defendant's place of abode came to his knowledge. Upon the question of actual notice, the return that a copy or summons was left is evidence, but not conclusive. The rights of the plaintiff are secured by permitting him to have judgment upon proof that the statutory notice has been given. If his cause of action is well founded, his judgment is in no danger of being reversed or vacated. If it is not well founded, the defendant

should not be compelled to submit to it unless he has in some way forfeited his right to question its validity; and upon showing that he has a defence, and that he had no notice of the plaintiff's action, he ought ordinarily to be permitted to try his case. Judgments are rendered on default upon a return of service by leaving a copy or summons at the last and usual place of abode of the defendant, or by publication, upon the assumption that the defendant having notice of the suit has admitted the plaintiff's claim by failing to appear and contest it. The record shows a legal service; but in every case where the defendant has no actual notice of the suit, the record, so far as it implies notice, is incorrect, and the judgment is rendered upon an erroneous assumption of fact. To hold the return of service conclusive evidence of notice would in all such cases deprive the defendant of any opportunity of defence.

If the defendant is entitled to relief, this is the appropriate form of remedy. It is comparatively speedy and inexpensive. There is no occasion or excuse for compelling a party to resort to another process, when, by bringing forward the original action, all errors may be corrected and justice administered. McIntire v. Carr, 59 N. H. 207; Metcalf v. Gilmore, 59 N. H. 417, 435; Moore v. Carpenter, *ante* 65. No serious inconveniences can result from granting relief from judgments rendered without notice. It is not to be apprehended that a defendant having a valid defence will suffer judgment to go against him by default, with a view of obtaining an opportunity to make his defence at some future time by a perjured denial of notice of the original action. Nor is it to be assumed that judgments will be modified or vacated except for sufficient cause.

The finding of the court must be set aside. The facts and conclusions stated in the reserved case in Moore v. Carpenter were not competent evidence. No judgment or decree had been rendered in that case. The verdict or findings of a tribunal upon which no judgment has been rendered are not competent evidence to control or influence the judgment of another tribunal upon the same question. King v. Chase, 15 N. H. 9, 13, 14; Hayward v. Bath, 38 N. H. 179. Upon competent evidence, the court at the trial term will determine whether justice requires that the defendant's motion should be granted.

Exceptions sustained.

INSURANCE CO. OF NORTH AMERICA v. SWINEFORD.

28 Wisconsin, 257. [*1871.*]

DIXON, C. J. * * * The facts shown by the affidavits in excuse of the default and failure to answer, and as a reason for setting aside the judgment and letting the defendants in to a trial on the merits, are, in our judgment, insufficient. They show a case of inexcusable neglect and delay, and are in some respects inconsistent with good faith and fair dealing on the part of the defendants or their agents. The loss occurred more than eight months before the action was commenced, and it was over three months after service of process when judgment by default was taken. In the meantime, both before and after the commencement of the action, negotiations were pending for a voluntary settlement and payment of the loss. The liability of the company was not seriously denied, and promises of payment were made as well on the part of the general agent of the company as of one or more of its special agents. The plaintiff was induced to believe that her claim had been or would be allowed by the company, and payment made without objection. It furthermore appears that before the suit was commenced, and, the inference is, a considerable time before, the agents of the company—the local one at Fond du Lac, one of the general agents for the northwestern states at Chicago, and a special agent deputed for that purpose—had fully investigated the facts touching the loss. It does not appear that any new fact or material circumstance has been discovered since those agents made their investigation. The facts are such as they ascertained, and as were known by them before the action was commenced. With eight months intervening, and three agents engaged in the investigation, the defendants should have been prepared at the end of the time either to pay or put in their answer. There was no good reason for their not having answered. The sickness, disability or business engagements of one of the agents at Chicago, was no excuse. His partner was not sick or disabled, and he had been upon the ground and knew the facts. The agent who was sick had not. The answer might have been prepared under the direction of either of the three agents who had investigated, and have been verified by any one of them. The failure to answer was, therefore, the result of mere inexcusable negligence on the part of the company or its agents, unless the practice of the company of requiring the pleadings in actions

against it to be sent to the home office for examination and advice, made it otherwise. But such practice did not necessarily interfere with or prevent an answer in time; and if it had, the question would be, whether the law should conform to the practice of the company, or the practice of the company to the law. We think the law would prevail in such a case, and that the company must so regulate its business as to conform to the law, unless some reasonable excuse is shown.

On the whole, we are of opinion that no case was made out to justify the setting aside of the judgment, and that the order of the court below was right.[1]

By the court. *Order affirmed.*

ELLIS v. BUTLER.

78 Iowa, 632. [*1889.*]

Appeal from an order refusing to set aside a judgment by default in an action for attorney fees.

ROBINSON, J. * * * I. The affidavit was made by the attorney for defendant, and shows that on the evening of the twenty-third of January he learned that it was necessary for him to go to Elma, in Howard County, the next day, on urgent and important business; that he at once called on the judge who was holding the term, at his hotel, and informed him that it was necessary to go to Elma, as aforesaid, requesting that he be excused from attendance at court; that he was informed by the judge that he would be protected so far as it could be done; that he had no reason to believe that the cause would be reached for trial at that term, and that the court had stated on the morning of the twenty-third of January that it would not be reached for trial at that term; that before leaving for Elma he prepared an answer, a copy of which is attached to and made a part of the affidavit; that he did not file the answer for the reason that he

[1] And so where the sickness of an attorney would not have prevented him from obtaining an extension of time to plead, before the original period expired. Byers v. Jacob, 164 Mo. 141.

From the nature of the question involved, negligence of the party or his attorney, excusable mistake, neglect, etc., there is frequently room for a fair difference of opinion, which is expressed by saying that the trial judge has a wide discretion in such matters. Hulbert v. Tredway, 159 Mo. 665.

was awaiting a decision on the motion; that before starting for Elma he had no reason to believe that he should not return to Charles City on the evening of the twenty-fourth; that he was unavoidably detained at Elma on that evening until it was too late to reach Charles City, to which he had to drive, a distance of twenty-five miles; that he left Elma early the next morning, and arrived at Charles City at about eleven o'clock in the forenoon.

It is insisted that the affidavit does not show due diligence on the part of the defendant, and does not excuse his default. It is said that the motion to transfer the cause to the law side of the calendar did not assail the petition; hence it did not suspend the necessity of pleading. See Code, sections 2635, 2636, 2640. The motion was filed under the provisions of section 2516 of the Code. That provides that a defendant "may have the correction made by motion at or before the filing of his answer," where the wrong proceedings have been adopted. It is clear that defendant had a right to insist upon a ruling on his motion before he filed his answer; hence he was not negligent in not filing it until after that ruling was made.

Appellant relies in part upon the alleged promise of the judge to protect him so far as he could, and upon the statement of the court that the case would not be reached for trial at that term; but we must presume that the court, in ruling on the motion, considered all matters of which it had personal knowledge, and that, so far as such matters may not have been fully shown by the record, they tend to sustain its ruling. The court knew what it had announced in regard to the trial of this cause, and what the judge had said to the attorney for defendant; and we must conclude that nothing was so announced or said which justified defendant in believing that an answer would not be required within the time fixed by law.

But the affidavit shows that the attorney for defendant was called away from court on urgent and important business; that the motion to transfer to the law side of the calendar had not been determined; that before he left he prepared an answer, which set forth a meritorious defense to most of plaintiffs' claim; that when he left he expected to return to Charles City in the evening when a ruling on the motion might be expected, and before the case was called for trial; that he was unavoidably detained at Elma, and in consequence was not able to reach

Charles City until eleven o'clock of the morning during which the case was reached for trial, and default and judgment were entered against his client. These matters could not have been within the knowledge of the court. They show an intent to appear and defend on the merits, and we also think they show due diligence on the part of defendant to prepare and present his defense. It was within the power of the court to impose such terms upon the setting aside of the default as would have been just to defendant, and as would have protected the plaintiffs. We are of the opinion that it erred in refusing to set the default aside. See Code, § 2871; Ordway v. Suchard, 31 Iowa, 481; Westphal v. Clark, 46 Iowa, 264; Jean v. Hennessy, 74 Iowa, 349; McNulty v. Everett, 17 Iowa, 581; Wishard v. McNeil, *ante* p. 40.

II. It is claimed that the affidavit of merits was not sufficient. It incorporated a copy of the answer which had been prepared, and stated that the allegations of the same were true. The answer contains a denial of all averments of the petition, not admitted, and states that defendant consulted plaintiffs for about half an hour, but never retained or employed them in regard to the claim mentioned in the petition, nor any other; that in August, 1888, he visited their office to pay for the consultation, when they demanded of him two hundred and fifty dollars; that he promptly refused to pay that sum, and left their office, but returned a short time thereafter and tendered them the sum of fifteen dollars, which tender was refused; that defendant has been, at all times since said tender was made, ready and willing to pay the amount of the tender. We think the answer showed a good defense as to the claim of plaintiff in excess of fifteen dollars. It not only denied the allegations of the petition so far as they were not admitted, but set out the facts of the case as claimed by the defendant. If his claims are well founded, the judgment against him was excessive.

III. Appellees object that the affidavit was not made by the defendant, but by his attorney.[1] The affidavit shows that the attorney had knowledge of the matters alleged in the answer, and that he must have had special knowledge of the cause of the delay in filing it. The affidavit was therefore sufficient. Jean v. Hennessy, *supra*. *Reversed.*

[1] Where the affidavit is made by an agent or attorney, it must appear that he had personal knowledge. Peoples Ice Co. v. Schlenker, 50 Minn. 1.

CHAPTER III.

CONTINUANCES.

REVISED STATUTES MISSOURI,[1] 1909.

§ 1956. APPLICATIONS FOR CONTINUANCE TO BE IN WRITING, UNLESS. Every application for a continuance shall, unless the adverse party consent that it be made orally, on oath in open court, be made by motion in writing, accompanied by the affidavit of the applicant, or of some other credible person, setting forth the facts on which the application is founded.

§ 1957. NEGLECT OF PARTY NO CAUSE FOR CONTINUANCE. A continuance shall not be granted for any cause growing out of the fault or negligence of the party applying therefor.

§ 1958. CONTINUANCES—ATTORNEY IN LEGISLATURE. In all suits at law or in equity pending in any court of this state at any time when the general assembly is in session, it shall be a sufficient cause for a continuance if it shall appear to the court, by affidavit, that any party applying for such continuance, or any attorney, solicitor or counsel of such party, is a member of either house of the general assembly, and in actual attendance on the sessions of the same, and that the attendance of such party, attorney, solicitor or counsel in court is necessary to a fair and proper trial of such suit; and on the filing of such affidavit the court may continue such suit, and when so continued no trial or other proceedings shall be had therein until the adjournment of the general assembly, nor for ten days thereafter. Such affidavit shall be sufficient, if made at any time during the session of the general assembly, showing that at the time of making the same such party, attorney, solicitor or counsel is in actual attendance upon such session of the general assembly.

[1] For corresponding provisions in Illinois. See Hurd's Revised Statutes 1913, Ch. 110, Par. 62, 63, 64, 65, 67.

§ 1959. APPLICATIONS SHALL STATE WHAT FACTS. Applications for a continuance on account of the absence of witnesses or their evidence shall state facts which show: First, the materiality of the evidence sought to be obtained, and due diligence upon the part of the applicant to obtain such witness or testimony; second, the name and residence of such witness, if known, or, if not known, the use of diligence to obtain the same, and also facts showing reasonable grounds of belief that the attendance or testimony of such witness will be procured at the next term; third, it shall also state what particular facts the affiant believes the witness will prove, and that he knows of no other person whose evidence or attendance he could have procured at that term, by whom he can prove or so fully prove the same facts; fourth, that such witness is not absent by the connivance, consent or procurement of the applicant, and such application is not made for vexation or delay, but in good faith for the purpose of obtaining a fair and impartial trial.

§ 1960. INSUFFICIENT APPLICATION OVERRULED, OTHERWISE SUSTAINED. If the court shall be of the opinion that the affidavit is insufficient, the court shall permit the same to be amended; and if after such amendment the affidavit does not contain a sufficient statement of facts as herein required, the court shall overrule the same; but if, upon the contrary, the court shall find the affidavit sufficient, the cause shall be continued, unless the opposite party will admit that the witness, if present, would swear to the facts set out in said affidavit, in which event the cause shall not be continued, but the party moving therefor shall read as the evidence of such witness the facts so stated in such affidavit, and the opposite party may disprove the facts disclosed, or prove any contradictory statements made by such absent witness in relation to the matter in issue and on trial.

§ 1961. AMENDMENT OF PLEADING, WHEN CAUSE FOR CONTINUANCE. When a party shall amend any pleading or proceeding, and the court shall be satisfied, by affidavit or otherwise, that the opposite party could not be ready for trial in consequence thereof, a continuance may be granted to some day of the same term, or to the next regular term of the court.

DAY v. SAMSON.

Barnes' Notes, 448. [*1741.*]

Upon showing cause against a rule for putting off a trial it was objected to the affidavit, *ex parte Defendentis,* that it was made by a third person, and not by the party himself; but this was overruled by the court. There may be many cases where a third person can swear another to be a material witness, and the defendant himself cannot; as where a factor sells goods for his principal, and employs a porter to deliver them; the factor knows the porter to be a material witness, but the principal does not, etc. The court took another objection to the affidavit, which runs thus: That A. B. and C. D. are material witnesses for defendant in this cause, without whose evidence defendant cannot safely proceed to trial, as defendant is advised, and verily believes. The belief seems to go through the whole, as well as to A. B. and C. D. being material witnesses. As to the other necessary part of the affidavit (that is) that the party cannot safely make defence without their testimony, though the former part (that is) A. B. and C. D. being material witnesses, ought to be positively sworn; belief, as to it, is not sufficient; but as to the latter part it is. These two requisites ought not to be coupled, but disjoined. The court enlarged the rule that the affidavit might be amended; which being done, a rule was made to put off the trial. Skinner for defendant; Wynne for plaintiff.

LORD v. COOKE.

1 Wm. Blackstone, 436. [*1763.*]

Motion to put off a trial, on the usual affidavit of the absence of a material witness, who was gone to the East Indies, and not expected home under eighteen months. The court would not grant the rule *nisi,* unless the defendant would engage to make a special case, stating the nature of the demand, and what it was the witness could prove. Which being accordingly done, the court thought it not sufficient to stay the trial; and therefore discharged the rule that had been obtained to show cause.

HILL v. PROSSER.

3 Dowling, 704. [*1835.*]

This was an application by the defendant to postpone the trial of a cause till the sittings in Trinity term, upon an affidavit of the absence of a material witness.

W. H. Watson, in showing cause, objected that there was no affidavit of merits.

PARKE, B. Generally, upon such a supervenient discovery as the absence of a material witness, it is not necessary to swear to merits for the purpose of a motion of this nature.[1]

The rule was disposed of on other grounds.

REX v. LE CHEVALIER D'EON.

3 Burrow, 1513. [*1764.*]

Monsieur D'Eon, who came over hither in the quality of secretary to M. le Duc de Nivernois, the late French ambassador, and after the duke's departure, remained here charged with the affairs of France, was afterwards (upon a particular occasion) invested with the character of minister plenipotentiary. Upon the arrival here of the present French ambassador, the Count de Guerchy, M. D'Eon set up a press in his own house, and in his book there printed under his own inspection, libelled the Count de Guerchy. Upon this, an information was filed against him by Mr. Attorney General, not only for printing and publishing this libel, but as an infractor of the law of nations: and notice of trial was given. Whereupon M. D'Eon (by his counsel) moved to put off the trial, on account of the absence of several material witnesses, whom he specified in his affidavit: and his affidavit contained the usual assertions requisite for putting off a trial, and particularly "that they were material witnesses for him; that he could not safely go to trial without their evidence; and that he had hopes and expectation of procuring their presence by next Michaelmas term."

[1] But see City of Elgin v. Nops, 212 Ill. 20.

Upon showing cause against putting off the trial, it appeared that the libel was not printed or published till March or April; and that these witnesses went away from England to France, in the preceding November or December. It appeared also, that they were natives of, and resident in France; that they were in the service of that crown; and that there was no probability of their being sent over, or even permitted to come over, to give evidence on behalf of M. D'Eon (who stood, at this time, in no favorable light at his own court, but very much otherwise).

After a full hearing of counsel on both sides (M. D'Eon being present), the court were unanimous that there appeared no sufficient reason for putting off the trial.

They granted that in all cases, whether criminal or civil, and whether the nature of the proceeding be instantaneous or otherwise, a trial shall not be so hurried on, as to do injustice to the defendant; an affidavit in common form may be sufficient where no cause of suspicion appears: but men take such latitude to swear in the common form, that where a suspicion arises from the nature of the question or from contrary affidavits, the court will examine into the ground upon which the delay is asked; and have, in criminal as well as civil cases, refused to put off a trial, notwithstanding an affidavit in common form.

It is necessary therefore in such a case as this (1st), to satisfy the court that the persons are material witnesses; 2dly, to show that the party applying has been guilty of no *laches* nor neglect, in omitting to apply to them and endeavor to procure their attendance; and 3dly, to satisfy the court that there is a reasonable expectation of his being able to procure their attendance at the future time to which he prays the trial to be put off.

But in the present case, all these reasons fail.

These witnesses are sworn to be material, as the defendant apprehends and believes. But on the contrary, it appears (negatively) that they can not be material: for, as they were gone out of England some months before the printing or publication of this book; they could not be conusant of the facts of the offence laid in this information. If their knowledge relates to any circumstances that may serve to mitigate the punishment in case he should be convicted, that sort of evidence will not come too late after conviction of the offence, and may be laid before the court by affidavits.

But if it should appear upon the case proved at the trial,

"that the defendant was prejudiced by refusing this delay," the court could set it right by granting a new trial: which had often been said upon like occasions; but no case had yet happened, where any prejudice appeared to have been done by the court's refusing, upon particular circumstances, to put off a trial notwithstanding the formal affidavit.

As to their being sent out of the kingdom by the Count de Guerchy himself, on purpose to prevent their giving testimony in the cause (which has been alleged), there neither is any proof of it, nor is it possible that it could be so: they were actually gone before the fact which is the subject of the charge was committed. It is impossible that they could be sent abroad by M. de Guerchy to prevent their giving evidence in this cause, the foundation of which did not exist at the time when they went. If they had been material witnesses for the defendant in this cause, and had been sent away by the person on whose account the prosecution is carried on, that indeed would have been a sufficient ground for putting off the trial till they could be had. But here is no pretence for such an insinuation.

Neither does it appear, that there has been the least endeavor used by this gentleman or any on his behalf, to get them over.

And as to any expectation of their returning to England by the next Michaelmas term or at any future time, there does not seem to be any probability of it: nor does the defendant lay before the court any grounds of such an expectation. On the contrary, the reverse is highly probable; the presumption seems strong, that they will not come. They cannot be compelled to come: and it does not seem likely that they will be ordered to come, for this purpose. These are foreigners, natives of and resident in France, and in the actual service of that king: which renders this case quite different from the ordinary cases of English witnesses being accidentally gone abroad, or gone for a small time only, and expected to return to their own country, their natural home and residence.

Upon the whole, they were clearly of opinion "that the putting off the trial could not tend to advance justice, but on the contrary would delay it;" and therefore discharged the rule for showing cause why it should not be put off.

Rule discharged.

M. D'Eon was soon after tried and convicted, upon so clear evidence, that he made no defence, and from the proof against

him by witnesses and writings under his hand, it was impossible for him to make any defence. Yet he seems to have sheltered himself under some *salvo,* in swearing the persons in France to be "material witnesses."

WORSLEY v. BISSET.

3 Douglas, 58. [*1782.*]

In an action for criminal conversation with the plaintiff's wife the defendant obtained a rule to show cause why the trial of this cause, which stood for the sittings after this term, should not be put off on account of the absence of Lord Cholmondeley, who was at Paris, whom the defendant apprehended to be a material witness, and whom he expected home in the course of a few months. But it not appearing that any application had been made to Lord Cholmondeley to know whether he would come over and give evidence, the rule was discharged, Lord Mansfield saying that it was by no means of course to put off a trial on such a general affidavit.

DALE v. HEALD.

1 Carrington & Kirwan, 314. [*1844.*]

This was an action on a policy of insurance, in which notice of trial had been given for the Durham Spring Assizes, 1844. At the sitting of the court on the first morning of the assizes Knowles, for the defendant, applied to put off the trial until the next assizes on an affidavit, which stated that issue in the cause had been joined on the 23rd of February, 1844 (which was just in time to allow of notice of trial being given for the assizes); that the action involved a question of French law, and that after issue joined, a messenger had been sent to France for the purpose of procuring the attendance of a material and necessary witness, which messenger had not yet returned.

Temple, for the plaintiff, opposed the application on the ground that the attendance of the witness might have been procured at an earlier period.

ROLFE, B., however, was of opinion that a party could not be presumed to know what evidence he would require until after issue joined, which in this case had been done just in time to admit of notice of trial being given for the assizes, and as there appeared to have been no delay on the part of the defendant in procuring the attendance of the witness in question, he accordingly allowed the application, on condition of the defendant bringing the money into court, and paying costs.

MACKUBIN v. CLARKSON.

5 Minnesota, 247. [*1861.*]

By the Court, ATWATER, J. The first error alleged on the part of the appellant, is the refusal of the court below to grant a continuance on the affidavit of the defendant. The affidavit stated that he (defendant) had stated the facts in this case to H. L. Moss, Esq., his attorney, and that he is advised by his said attorney that he cannot safely proceed to trial without the testimony of August Hageman, who is a material witness in this action. That said Hageman had resided in St. Paul during the past year, and that since the commencement of the court he had informed the defendant that he would be ready at any time to attend and be present at the trial of the cause. That on the evening of the 3d of October the deponent had sent to the residence of Hageman to have him in attendance before the court, and was informed that within the last ten days he had gone to Memphis, Tennessee, and would be absent three months. The affidavit further stated, that relying upon the promises of the witness he had not subpoenaed him, had no knowledge of his intention to leave, and expected to be able to procure his testimony at the next term, etc.

The affidavit also stated that one Kittel was also a material witness for the defendant. That he had been absent from the state since the cause was at issue; that he had been unable to ascertain his residence or whereabouts, but that he was expected to return to the state, and that deponent expected to be able to procure his testimony at the next term of the court. The affidavit did not state what was expected to be proved by either witness.

There was no error in the refusal to grant a continuance on this affidavit. There was no diligence whatever shown to procure the attendance of Hageman. If a party chooses to rely upon the promise of a witness to be in attendance, without subpoenaing him, he does so at his own risk, and cannot, on that ground, claim a continuance if the witness does not keep his agreement. (Beaulieu v. Parsons, 2 Minn. 37.) The affidavit is also defective in not showing wherein the witnesses were material. The facts which the party proposes and expects to prove by the witnesses should be set out in the affidavit, so that the court may judge of the materiality of the witness. The party himself is not to be the judge of the materiality of testimony. If this were so, there are probably few cases in which an adjournment would not be obtained, once at least, and perhaps many times. We are aware of no authorities which sustain a continuance on such an affidavit, and if there are any, they are entitled to little weight. The least that can be required on this point is, that the party should state that he has stated the facts which he expects to prove by his absent witnesses to his counsel, and that he is advised by his counsel that he cannot safely proceed to trial without the testimony of such witnesses. But the better and correct practice is as above stated, to set forth the facts in the affidavit, that the court may be advised as to whether the testimony is necessary or otherwise.[1] * * *

EVANS v. POND.

30 Missouri, 235. [*1860.*]

EWING, Judge, delivered the opinion of the court.

The only question in the case is the ruling of the Circuit Court, in refusing a continuance.

[1] And so as to the steps taken to obtain the testimony—Cooper, J., in Washington County v. McCoy, 1 Minn. 100. "There is no allegation that a subpoena ever issued, or that he refused to obey its mandate, or that even a request had been made, or notice given him of the time and place where his testimony was to have been taken. All these things, did they exist, should be set out in the affidavit. It is not enough, under any circumstances, merely to swear to the judicial conclusion, that due diligence had been used. It is for the Court or Justice to say whether the acts of the party amount to due diligence, and not for the affiant."

It appears from the record that the cause was set for trial on the 6th of May, 1858 (the suit being on a promissory note); that it was called for trial on that day, but not tried; was again called on the 7th; whereupon the appellant filed his motion, with an affidavit, for a continuance on account of the absence of certain witnesses, which was overruled. The affidavit alleges that after the cause was set for trial and in ample time before the day of the trial, the affiant caused subpoenas for said witnesses to be issued and placed in the hands of the sheriff; that the sheriff returned said subpoenas "not found," and that as soon as the affiant discovered this fact, which was not until the 6th day of May, 1858, he searched for said witnesses, and had used his best endeavors to find them and procure their attendance. The bill of exceptions shows that the subpoena for the witnesses, on account of whose absence the application for a continuance was made, did not issue until the 5th of May, only one day before the cause was set for trial; and this was the first time any steps were taken to procure the attendance of the absent witnesses. We think the application fails to disclose any sufficient grounds for a continuance, and that it was properly refused.[1]

Judgment affirmed.

Judge Scott concurs. Judge Napton absent.

CONNER v. SAMPSON.

22 Texas, 20. [*1858.*]

ERROR from TRAVIS. Tried below before the Hon. A. W. TERRELL. Suit by defendants in error against plaintiff in error. Defendant in the court below applied for a continuance, on account of the absence of a material witness; and made affidavit that he had used due diligence to procure his testimony, by having the witness duly subpoenaed, during the term at which the

[1] Pinney, J., in Davis v. River Side Co., 84 Wis. 262. "There is no absolute standard of diligence. It depends upon the usual course of procedure and course of business, the situation or location of the absent witness or desired evidence, the facilities which may be employed to obtain it, and all facts and circumstances of the case."

application was made; but it did not appear from the affidavit, or otherwise, on the record, at what time, or under what circumstances, the witness was subpoenaed. The court below overruled the application.

ROBERTS, J. The application for a continuance is defective in this, that it does not show that the witness had been served with a subpoena, a reasonable time before the trial, to enable him to be present at the trial. The point was decided at Tyler (1858), that it must appear from the affidavit, unless it otherwise appear of record, that reasonable time has been given the witness to make necessary preparations to attend the court at the time of the trial, otherwise the party could not be held to have used due diligence to procure his attendance. What this reasonable time is, must depend upon the distance of the witness from the court, and other surrounding circumstances. A party should, if practicable, have his witnesses served with a subpoena before the commencement of the court. If, however, he relies upon having done it during the term, he must show that it has been done a reasonable time before the trial.

This affidavit would be literally true, although the witness had been served with a subpoena twenty miles from the courthouse five hours before the cause was called for trial. There is no return upon a subpoena, or other evidence on the record, which shows that diligence has been used. Without some such exhibition of diligence, in some way or other, upon the record, we cannot say that the court below erred in overruling the application for continuance.

Judgment affirmed.

MAYNARD v. CLEVELAND.

76 Georgia, 52. [*1885.*]

CLARKE, J. At the trial, defendant moved for a continuance for the want of, and in order to obtain, the testimony of one Brantly. By him he desired and expected to prove that, in witness's presence, Wilde C. Cleveland had actually paid to him $500. Defendant had all along known that Brantly was present at the transaction, and that he lived out of the county. But,

although the case had been in court several years, he had not sued out his depositions, nor engaged him to attend, nor even consulted him on the subject. As an excuse for this apparent negligence, he made the following showing: Defendant's counsel stated that, at the preceding term, he had heard that complainant expected to prove by Wilde C. Cleveland that the latter did not in fact pay to defendant the $500 for which defendant had given him a receipt. Thereupon, he called on said Cleveland to know what his testimony would be on that point. W. C. Cleveland replied that, to the best of his recollection, defendant's statement was correct. Defendant himself swore that said Cleveland had told him that his (defendant's) statement of the matter was correct; and also testified that said Cleveland and said Brantly were the only persons present at the transaction. Both defendant and his counsel swore that they had no intimation of any change in W. C. Cleveland's mind on that point until the evening preceding the trial, when they discovered in depositions executed that afternoon Cleveland's contrary evidence. Defendant swore that he was misled by this course of W. C. Cleveland (who was brother to complainant) into the belief that his own statement would be confirmed by that of W. C. Cleveland, and contradicted by nobody, and therefore did not deem it needful to procure Brantly's testimony. He also exhibited a postal card received from said Cleveland as follows:

"Dear Sir—I promised Judge Hall" (who was and is defendant's counsel) "at your last court to come over to Forsyth during this term. He requested me so to do; and while I hope sincerely that you will neither need me or sustain any loss, yet I am willing to do anything for you, and will be over Monday night or Tuesday morning, and desire to see you and Judge Hall together. I am exceedingly sorry that you are troubled in this suit as you are, and truly hope that you will come out victorious *in toto*.

February 22, 1884. Wilde C. Cleveland."

The case was called Thursday, the 28th of February. Cleveland had come as promised, but had not apprised defendant or his counsel of any change in his mind, and having sudden occasion to leave the county on Wednesday afternoon, by consent, his depositions were taken at the instance of complainant. Immediately upon discovering what said Cleveland had sworn, every effort practicable was made to get Brantly there. It was ascer-

tained that he was somewhere abroad, traveling in the interest of a Macon mercantile house, and could not be found. Defendant swore that he did not ask the continuance for delay, but in order to get Brantly's testimony. The court overruled the motion.

It was not disputed below, or here, that the testimony of Brantly was highly material. The court placed its judgment on the proposition of law, that as the misleading of the defendant was not done by complainant or his counsel, a continuance could not be allowed. This court has repeatedly held that continuances are in the discretion of the court, and that, when refused, unless there is an abuse of discretion, this court will not interfere. But where it plainly appears that the court below acted on an erroneous notion of the law, and that without that error, the showing would have been satisfactory, and that in consequence of the refusal of the continuance the party has suffered a serious disadvantage, we hold that a tribunal for the correction of errors of law has distinct ground for reviewing the decision.

That defendant suffered a serious disadvantage is clear. He and Wilde C. Cleveland were both parties to the transaction under inquiry. Their testimony conflicted on the precise point. Brantly, as appears by his affidavit in support of the motion for a new trial, would have sworn positively to seeing W. C. Cleveland actually pay over a large roll of money to defendant, at the time and place referred to, when said Cleveland denied that any money passed. Who can say that this would not have turned the scales in the hands of the jury in favor of defendant? But it is claimed that it has been held that the absence of cumulative evidence is no ground for a continuance; and that if a party has one witness present to testify to the same point, he cannot continue to get another. Surely, where the only witness present to testify to the point is a party at interest, and where the other party contradicts him, it cannot be the iron rule of the law that he may not have needful time and fair opportunity to bring in disinterested testimony to settle the dispute. It cannot be the policy of the law, which discourages an unnecessary and expensive array of witnesses to one point, to encourage parties to rely on their own contradicted statements.

In 5 Georgia, 80, it is held, "It would be no reply to his want of diligence that he and his counsel did not think the testimony would be needed in the cause until it was on trial." That was a suit against indorsers of a bill of exchange, who, by the well-

settled common law, were entitled to demand and notice. The bank cashier, who made the demand and served the notices, though residing in Columbus, where the trial occurred, had not been subpoenaed, nor even requested to attend. When the cause was being tried, the cashier could not be found. For want of this indispensable part of the plaintiff's case, he was non-suited. On his motion for a new trial, we are not surprised that the court should hold the language above cited.

The case cited by defendant in error in 23 Georgia, 613, has for a head-note, "A party is not entitled to a continuance on the grounds of the absence of testimony, unless he has taken some steps to procure that testimony." But the showing set forth that defendant had "failed to take the witness's depositions, because he expected the witness to be present at the trial." Here was a plain case of laches.

In 55 Georgia, 21, during the trial, defendant moved to continue because he was surprised at the testimony of plaintiff's witness, and desired to procure contradictory evidence. There was no diligence in trying to learn what the plaintiff's witness would say, no authorized reliance on his favorable testimony, no misleading: Held, that there was no legal surprise at the testimony of his adversary.

In King v. The State, 21 Ga. 221, the defendant, indicted for assault with intent to murder, claimed surprise because the prosecutor testified to his guilt, and asked a new trial in order to get the evidence of two witnesses, whom he all along knew to have been present at the difficulty, but had not summoned, because he did [not?] anticipate his need of them. He was not misled by anybody. Such surprise was manifestly entitled to no favor, and received none.

Susan Eberhart, convicted of murder, asked a new trial because a continuance had not been allowed her. Her grounds were, first, that owing to the recency of the homicide, and her arrest, and the public excitement against her, she could not safely go to trial; second, her counsel had not had sufficient time to prepare her defense. The first ground was mere matter of opinion, and obviously was better left to the discretion of the presiding judge than to a distant reviewing tribunal, who could not so well know the state of the public feeling. The latter ground showed no particular, either as to fact or law, wherein the counsel could not be prepared. This, too, was rightly left to the discretion of the

court, where the counsel were well known. In that case, the Supreme Court held that, as there was no abuse of discretion apparent, a new trial would not be granted.

None of these decisions seem at all in the way of a new trial in the case at bar. In Wilson v. Brandon & Shannon, 8 Ga. 136, it was ruled that "where, on the trial of a cause, a witness, from mistake, failed to prove a necessary fact, to make out the defense to an action, the witness having previously assured the defendant that he could and would do so, whereby the defendant was prevented from procuring other evidence to prove the same fact, which it would have been in his power to do; and a recovery was had in consequence of such mistake, both on the part of the witness and the defendant: Held, that such mistake operated as a surprise on the defendant, and that a new trial should be granted."

The case at bar is claimed to be distinguished from that last cited, because the misleading witness here was not the defendant's, on whom he had a right to rely, but the complainant's, on whom he was not authorized to rely. Can it be possible that this makes any difference? When W. C. Cleveland was summoned, or examined, as a witness at complainant's instance, did that give complainant any exclusive property in him or his evidence, so that defendant might not consult his knowledge of the facts, and rely upon his statements as to his evidence? Nothing is more common than for both sides to subpoena the same witness. His testimony may be indispensable to both. In part it may favor one, in part the other. Here Cleveland's postal shows that Judge Hall had asked him to attend in favor of defendant, and that he had promised to do so. The presumption of law is, that a witness, summoned to court by either side, comes as an impartial witness to the truth. The mere fact that one party has first summoned him may, indeed, excite the suspicion of the other party, that his adversary has ground to expect to be benefited by the testimony. Thus he may be put upon inquiry. But when he has actually inquired of the witness himself, and been told that, on a certain point, he will support the inquirer, then whether the inquiring party may rely on him or not, depends on all the considerations which ought to influence a reasonable man. Why, in this case, should Maynard have distrusted W. C. Cleveland? There appeared no conflict of interest between them. They were both defendants to this bill, brought to make both liable for

wrong-dealing between them. Cleveland seemed to be his friend. Even down to the date of the postal card, strong assurance was given to his confidence. If anything is to be inferred against the prudence of trusting him, from the fact that the complainant had first called him, that inference seems exceedingly weak when we consider that the complainant might have called him to attest other facts in the case, and not this particular one; and that he might have been exercising his right to put upon the stand a party to whom he was opposed, in the hope of forcing a confession. Furthermore, it is a fact that the pleadings of complainant did not allege that the money was not paid, as Maynard claimed. Therefore, it did not appear that W. C. Cleveland was called by complainant for the express and sole purpose of proving that denial. We think that, when that fact was not expressly put in issue by the pleadings; when defendant had no ground whatever to expect contradiction from any other source, because he, Cleveland and Brantly only were present; when Cleveland, his friend, on special inquiry, told him and his counsel, separately, that defendant's statement was correct; and when, without any intimation to the contrary, he gave the assurances contained in the postal card, Maynard could not be charged with unauthorized credulity in relying upon his support in his testimony; nor could he be charged with negligence in not encumbering the case and increasing the labor and cost by taking Brantly's interrogatories to prove what was not denied by the pleadings, and, it seemed, was not to be denied by any witness, but rather to be attested by two. We think that the continuance ought to have been allowed. Brown v. State, 65 Ga. 332.

JARVIS v. SHACKLOCK.

60 Illinois, 378. [*1871.*]

Mr. Chief Justice LAWRENCE delivered the opinion of the court: We are asked to reverse the judgment in this case, because the motion for a continuance and the subsequent motion for a new trial were both overruled. The continuance was asked on two grounds; the absence of a witness and the illness of defendant's counsel. As to the first, it is only necessary to say that the affi-

davit does not state the defendant had no other witness by whom he could prove the facts stated in his affidavit as completely as by the absent witness. As to the illness of counsel, it appears that the case was first called on the 25th of November, and then passed because of the illness of defendant's counsel; that it stood over until the 12th of December, when defendant was notified by plaintiff's counsel that the cause would be called the next day, and the application for continuance was then made.

Illness of counsel would certainly be a good cause for continuance where the court can see that a fair trial is likely to be prevented by such illness, and the party moving for a continuance has shown no unreasonable carelessness. But this suit is of the simplest character. Its trial involved no question of law, and but one of fact, to-wit: whether certain property had been sold through the agency of the plaintiffs. The evidence is in a small compass, and a few minutes' conversation between the defendant and counsel would have enabled any practicing lawyer to try the case as well as if he had been engaged in it from the beginning. The defendant, as appears by the record, is himself a lawyer, and must have perfectly understood that no preparation would be necessary to try a case of this character for any lawyer competent to practice at all.

The motion for a continuance was properly overruled.[1]

SMITH v. CREASON'S EXECUTORS.

5 Dana (Ky.), 298. [*1837.*]

Judge EWING delivered the opinion of the court: The only question, which we deem necessary to determine in this case, is, shall a party who has made out good grounds for a continuance, on account of the absence of witnesses, be ruled to trial upon the admission of his adversary, that his witnesses who are absent, if present, would swear to the facts which he states, he expects to prove by them; or shall he be required to admit the fact proposed to be proven by them?

[1] See also Rosecrans v. Telephone Co., 65 Ia. 444.

The common law rule, of confronting the jurors with the witnesses, in a public, oral, examination, has ever been regarded by the wisest jurist, as a most invaluable rule in the ascertainment of truth.

By such an examination, a party has not only the benefit of the naked fact detailed, but also the benefit of the deportment, the manner, the physiognomy, the impression, detail, and intelligent reasons given by his witnesses, which are calculated to force conviction upon the triers, and greatly outweigh the same number of witnesses on the other side. Of all these he would be deprived, if compelled to go to trial upon the naked admission that his witnesses would swear to the facts which he proposes to prove by them. Such admission, if not forgotten, would make but little impression, amid a consistent and rational detail, of a similar number of witnesses, deposing, orally, to facts of a counteracting character.

His right to bring his witnesses before the jury, is a legal right, and which may be of essential advantage to him, especially in the establishment of controverted facts, and of which he ought not to be deprived. If therefore entitled to a continuance, in such a case, he ought not to be deprived of it by any admission short of the admission of the fact intended to be proved by his absent witnesses.

We perceive no error in the construction given by the Circuit Court to the writing sued on.

Judgment affirmed.

ALDEN v. CARPENTER.

7 Colorado, 87. [*1883.*]

STONE, J. Appellee brought suit against the appellant, E. K. Alden, and one A. L. Price, upon a promissory note, of which the following is a copy: * * *

Defendant Alden filed an affidavit for continuance, on the ground of the absence of a certain witness, by whom he expected to prove that said defendant Alden "authorized said Price to sign a note for the indebtedness to plaintiff, on the express condition that the said note should contain a provision for its renewal at the option of defendants at maturity, and that this provision

was afterwards omitted from the note when executed by said Price, as aforesaid, without said Alden's consent." The motion for continuance was argued by counsel and taken under advisement by the court, and afterwards, when the court was about to announce its decision granting the continuance, the plaintiff offered to admit that the witness, if present, would swear to what was stated in the affidavit it was expected to be proved by him, whereupon, against the objection of defendant Alden, the court allowed the offer of plaintiff and denied the continuance. This ruling of the court was expected to, and is made one of the grounds of error, counsel for appellant objecting that the offer of appellee was not made in apt time. We see no error in this ruling of the court. Such offer is a privilege of the party against whom the continuance is sought, and the allowance of the offer, as made, is within the discretion of the court, and we see no good reason why such discretion may not be exercised as well after the court has decided that the evidence is material, as when the motion is first made. It certainly would be unreasonable to expect that a party would admit the assumed testimony while he was at the same time contesting the insufficiency of the grounds for continuance. It is only when he knows that the continuance will otherwise be granted that such adverse party has any reason for admitting the supposed testimony sought by the continuance. The ruling of the court below was in accordance with the provisions of section 158 of the Civil Code practice.[1]

Another point made by counsel for defendants is that the offer of plaintiff should have been to admit the truth of the supposed testimony, and not merely that the absent witness would swear to the same if present. For the same reason error is assigned to the ruling of the court in allowing plaintiff, on the trial, to introduce evidence contradicting the admitted testimony of the absent witness. There was no error in this. Admitting the testimony of an absent witness, in order to avoid a continuance of the case, is not to be taken as an admission of the truth of such testimony; nor does such admission preclude the party admitting it from rebutting the same on the trial. Boggs v. The M. N. Co. 14 Cal. 358; Blakeman v. Vallejo, 15 Cal. 639; O'Neil v. N. Y. etc. Co. 3 Nev. 141; State v. Geddis, 42 Iowa, 264.

[1] Such a provision, as applied to civil cases, does not violate the "Due Process" clause. Geary v. Ry., 138 Mo. 251.

THOMPSON v. THORNTON.

41 California, 626. [*1871.*]

By the Court, WALLACE, J.: This is an action of ejectment, and issue was joined by the filing of the answer. The cause came on for trial on November 2d, 1870. The defendants on that day were present at the court, in Stockton, where the action was to be tried, but their counsel, who resided in San Francisco, was unable to attend the court, by reason of the sickness of two members of his family—so extreme in its character that the attending physician forbade him to leave, he being of opinion "that no prudent man could think of leaving his family for any length of time in the condition they were in."

On the morning of the day upon which the trial came on the defendants, for the first time, ascertained that their counsel could not attend, and the reason why he could not, and at once, upon receiving a telegraphic dispatch from him, made application to the court to continue the cause, after making an ineffectual effort to obtain other counsel, they having no opportunity to prepare the case for the defense. The Court refused to continue the case, even for a short time, to allow preparation for a defense by new counsel, if any could be found; but compelled the defendants to proceed, in the absence of their counsel, under the circumstances stated. The defendants swear that they were utterly unable to conduct the defense of the action themselves, and wholly unable to procure counsel, for the reason that no time whatever was allowed for counsel to prepare for trial. The defendants also swear that they have fully and fairly stated the facts of the case to their counsel, and that he has advised them that they have a defense upon the merits. The counsel also swears that he is, and for several years has been, acquainted with all the facts of the case; that he has been the counsel for one of the defendants for about six years; and that he believes that the defendants have a substantial defense upon the merits of the action, and that he has so advised them. The defendants being, under these circumstances, compelled to go to trial, judgment was rendered against them; and they thereupon moved for a new trial, upon the ground of accident and surprise; and their motion was supported by affidavits showing the foregoing facts in substance. The affidavits were not contradicted; but the motion

was, nevertheless, denied, and the defendants brought this appeal from the order denying the motion.

I think that the Court erred in denying the motion for a new trial. The affidavits show that the defendants have a meritorious defense to the action. They were not in default in the slightest degree. There was no lack of diligence on their part. They were ready for trial, and in attendance upon the Court with their witnesses. Everything that they could do of themselves, in the way of preparation, had been done; and but for the sickness in the family of their counsel they would have been ready to proceed to trial; and even when it was ascertained that he could not, for that reason, attend upon the Court, they only desired time for some other counsel to familiarize himself with the defense. This, at least, should have been allowed them.

The order denying a new trial is reversed, and the cause remanded; the *remittitur* to issue forthwith.

SOLOMON v. HOWARD.

12 Common Bench, 463. [*1852.*]

This was an action upon a bill of exchange for £295 17s., drawn by the plaintiff upon and accepted by the defendant, dated the 12th of September, 1851, and payable six months after date.

The bill in question was drawn for the price of certain goods which had been sold by the plaintiff to the defendant, who was a master-mariner trading between Liverpool and Shanghae, in China, subject to the following agreement, which was written at the foot of the invoice: "Any of the above goods that cannot be sold at the invoice price, we (the plaintiff) guarantee to take back again. I. Solomon."

The writ of summons was served upon the defendant on the 24th of March last. After three summonses for time to plead, upon the usual terms, the defendant, on the 22nd of April, pleaded *non accepit;* and afterwards obtained leave to amend by paying £52 into court, and pleading a plea of partial failure of consideration as to the rest.

The plaintiff [defendant?] sailed for Shanghae on the 8th of

April; and, the cause standing for trial at the sittings in London after this term,

John Henderson moved for a rule to show cause why the trial should not be postponed until his return, which was expected to be in the month of February next. The affidavits upon which he moved gave a detailed account of the dealings between the plaintiff and the defendant, and stated that the defendant's evidence was essential to make out his defense, and that, beyond the amount paid into court, he had a good defense to the action upon the merits. He stated that the parties had been before TALFOURD, J., at chambers, for a commission to take the examination of the defendant at Shanghae, when that learned judge doubted whether an examination of a party under a commission was warranted by the late statute. (JERVIS, C. J. I do not see why we should go out of the way to defeat the act, by giving such undue weight to the words "on trial." The clause speaks of "depositions." These must be taken before the trial. It is not necessary, however, to decide the point here.) This application rests upon the undoubted power of the court to postpone a trial, where it appears to be essential to the ends of justice that it should be done. (JERVIS, C. J. Your only ground for the motion is that it did not suit the convenience of the defendant to wait in England till after issue joined.) He was compelled to go, or give up his command. (JERVIS, C. J. How would it have been, before the late act, if the defendant had taken his witnesses abroad with him?) No doubt in that case he would be compelled to have recourse to a commission.

JERVIS, C. J. I think there ought to be no rule in this case. The defendant has brought the difficulty upon himself, by withdrawing before issue joined. He must take the consequences.

CRESSWELL, J. It would be scarcely fair to the plaintiff to allow a defendant who is under terms to go to trial at a particular time to obtain a postponement of the trial on grounds which existed and were not disclosed when those terms were entered into.

Rule refused.[1]

[1] See Rose v. Stuyvesant, 8 Johnson, 426, holding it an abuse of discretion to refuse a continuance where a defendant was kept away by sudden sickness in his family.

COVELL v. MARKS.

2 Illinois, 525. [*1838.*]

WILSON, Chief Justice, delivered the opinion of the Court:

The plaintiff in this action declared upon a promissory note for four hundred dollars. Upon the calling of the cause, the plaintiff asked and obtained leave to amend his declaration, which he did instanter by adding to the description of the note, the words "with twelve per cent. interest from the date until paid." The defendants thereupon moved the court for a continuance of the cause, which was refused, and judgment rendered against the defendants. The refusal of the court to continue the cause, and the rendition of the judgment are assigned for error. The rule is, that where the amendment to the declaration is a substantive one, it entitles the defendant to a continuance. The amendment in this case is clearly of this character. It made the note a different one from that at first declared on, by increasing the defendants' liability to the extent of the interest that might be due on the note. This in effect made the amended declaration a new one, which the defendants could not be called on to answer without ten days' notice preceding the commencement of the term of the court.

The copy of the note upon the back of the declaration, was no notice to the defendants of the one declared on. They were different not only in terms, but in their legal effect; and the one copied could not be given in evidence under the declaration.

The judgment of the Court below is reversed with costs, and the cause remanded.

Judgment reversed.

COLHOUN v. CRAWFORD.

50 Missouri, 458. [*1872.*]

BLISS, Judge, delivered the opinion of the court.

Suit was brought upon two promissory notes, and in the original petition the plaintiffs failed to allege their partnership and that of defendants. Defendants demurred and plaintiffs had

leave to amend, which was at once done by inserting the omitted allegations and filing the petitions anew. Defendants then applied for a change of venue from the Common Pleas to the Circuit Court, and obtained leave in said court to answer, but not answering, interposed several motions which were overruled, and the court permitted the plaintiffs to file an amended petition instanter, containing in the body of it the interlined allegations. Defendants then moved for a continuance of the cause because of such amendments, but the court overruled the motion, and no answer being filed, gave judgment by default.

The chief error assigned is the refusal of the court to grant a continuance. Some eight months had elapsed since the plaintiffs were entitled, under the statute, to a judgment in the Common Pleas. No defense upon the merits had been set up, and every step seems to have been for delay merely. In consequence of the omission of a formal allegation it had become necessary for plaintiffs to amend their petition, and the amendment was irregularly made. Taking advantage of this irregularity, after having removed the cause to another court, the action of defendants made it necessary for the plaintiffs to file an amended petition; but this of itself did not entitle them to a continuance. The statute (Wag. Stat. 1040, section 10) provides that "where a party shall amend any pleading or proceeding, and the court shall be satisfied by affidavits or otherwise that the opposite party could not be ready for trial in consequence thereof, a continuance may be granted to some day in the same term, or to another term of the court." Defendants do not pretend to bring themselves within this section; do not allege that they could not be ready for trial in consequence of the amendments; do not even put the allegations in issue, and had no shadow of claim to a continuance. Not only should the court be satisfied that the party could not be ready for trial, and that his inability arises from the amendment, which implies that he wishes to put in issue the new facts embraced in such amendment, but it should also appear that he has a meritorious defense to the claim shown by the new matter as well as by the original pleading.

Counsel rely upon a rule of the Circuit Court which provides that every material amendment after answer to the pleading amended, is cause for continuance. This rule stretches the statute, and, so far as it contradicts or goes beyond it, should not be enforced. But, even if valid, the defendants do not bring

themselves within it, for they have never answered. The term "answer," to make it at all consistent with the statute, must mean an answer to the merits, and such answer has never been made.

This appeal is so clearly made to enable the defendants to get further time upon their debt, that the plaintiffs are entitled to an affirmance and to the ten per cent. damages claimed by them. The other judges concur.

CHAPTER IV.

CONDUCT OF THE TRIAL.

SECTION 1. SELECTION OF THE JURY.

(a) *Challenges to the Array.*

1. Tidd's Practice, 2 Am. Ed. 715.

The first process for convening the jury is a venire *facias* which is a judicial writ, commanding the sheriff, or other officer to whom it is directed, to cause to come before the king at Westminster (by bill, or by original wheresoever, etc.) on a certain day therein mentioned, twelve free and lawful men of the body of the county, each of whom has ten pounds a year of lands, tenements, or rents, at the least, by whom the truth of the matter may be better known, and who are in no wise of kin either to the plaintiff or to the defendant, to make a jury of the country between the parties in the action, because as well the plaintiff as the defendant, between whom the matter in variance is, have put themselves upon that jury; and that he return the names of the jurors, etc.[1]

CHAM v. MATTHEW.

Croke, Elizabeth, 581. [*1597.*]

Trespass. Upon the case, the parties pleaded to issue. The plaintiff for his expedition of trial surmised that he was servant to the Sheriff of Cornwall, where the action was brought and triable, and prayed a venire *facias* to the coroners; and the defendant *non dedixit;* whereupon process was awarded to the coroners. And after trial and verdict for the plaintiff, Glenville

[1] Under this practice the jurors were not expected to appear upon the return of the venire, and afterwards a writ of distringas issued to enforce their attendance. Tidd's Practice, 718.

moved that this process was mis-awarded and a mis-trial; for process ought not to be awarded to the coroners but where the challenge is principal; and here to say, that he was servant to the sheriff is no principal challenge, as 21 Edw. 4. pl. 67. is, but only to the favor. Wherefore, etc. The Court held, forasmuch as if the sheriff had returned this panel, it had been a good cause to quash the array for favor, that the plaintiff to avoid that delay, might well show it, and have process to the coroners; and so much the rather, this being a judicial writ, and not original, as Plow. 74. Wimbishe's case is. And the clerks said there were many precedents accordingly. Wherefore it was adjudged for the plaintiff.

VICARS v. LANGHAM.

Hobart, 235. [*1618.*]

A writ of error was brought in the Exchequer Chamber, upon a judgment given in Exchequer between Vicars and Langham, and the error assigned was, that the Sheriffs of London having returned a jury, and they being called, and some not appearing, the defendant (?) prayed a *tales;* and after the jury made full by *tales,* then the plaintiff challenged the whole panel by exception to the sheriffs; whereupon the jury was quashed, and a new jury impaneled by the coroners; by which the cause was tried.

Now the exception was, that the plaintiff having prayed a *tales* to the sheriffs and obtained it, was estopped to challenge the panel for exception to the sheriffs.

But it was resolved that there could be no challenge neither to the panel, nor to the poll, till first there were a full jury; so that the jury not appearing full, there was a necessity to have a *tales,* or else the challenge could not have been taken; and so the cause would have remained *pro defectu juratorum,* if that the plaintiff had not prayed it, for the defendant would not, and so the judgment was affirmed.

And note, that in this case there were none sworn before the challenge, but only impanelled. But if the principal panel do once appear full, then the challenge must be taken to the panel before any be sworn, or else it comes too late.

Note that where the plaintiff sues his *ven. fac.* to the sheriff, he is not estopped thereby, to challenge the panel for kindred or other cause that was before the *ven. fac.* And though a juror may be challenged for a cause happened since he was sworn, yet the panel cannot be so; for no ill affection of the sheriff, arising since the jury sworn, can make the jury suspected, that was impanelled before.

REX v. JOHNSON.

2 Strange, 1000. [*1735.*]

The defendants in an information *in natura de quo warranto* obtained the common rule for a special jury, which was drawn up as usual, for the sheriff to attend with the freeholders book, and that he should return the twenty-four struck by the master. The prosecutor took out the venire to the sheriff of Cheshire. And the defendant challenged the array, on account of an interest the sheriff had, as being a freeman of Chester, whose rights were to be tried. And upon arguing this challenge before the Chester Judges, viz., Mr. VERNEY and Mr. JESSOP, they were of opinion to allow the challenge; though it was much insisted on, that since the late act the sheriff had no influence, he being only to return the list brought him as struck; but the right of challenging not being taken away, nor his power of marshaling the panel and putting which he pleased first, it was determined to be a good challenge, and the array was quashed.[1]

[1] Baylis v. Lucas, 1 Cowper, 112: "Upon a rule to show cause why the writ of inquiry executed in this case should not be set aside, exception was taken that the jury were returned by the attorney for the plaintiff. Mr. Justice Aston.—The rule must be made absolute. Upon a motion for a new trial in a cause from the Oxford circuit in the year 1756, it was objected, that Penoyer Watkins, who was under-sheriff, was attorney for the plaintiff, and that three of the jury were his own relations. The Court said, that every trial ought to be fair and indifferent: and, therefore, ordered the rule for a new trial to be made absolute.

Mr. Justice Ashhurst.—If the under-sheriff is attorney in the cause and returns the jury, no doubt it is a good cause of challenge. *Per Cur.* Let the rule be made absolute."

For an example of misconduct by a sheriff's bailiff, see Rex v. Whittaker, 2 Cowper, 752.

MONTGOMERY v. STATE.

55 Florida, 97. [*1908.*]

WHITFIELD, J. (after stating the facts). Having been convicted of embezzlement, the plaintiff in error insists here on writ of error that the trial court erred in overruling his challenges to the array of jurors made on the ground that there was illegal discrimination in the selection and summoning of the jurors.
* * *

The constitutional guaranty of equal protection of the laws does not give to any person a right to a jury composed in whole or in part of his own or of any particular race; but every person being tried in a court of justice is entitled to have a jury selected and summoned without illegal discrimination of any character. A large discretion is necessarily allowed the officers charged with the responsible duty of selecting jurors. This discretion should be carefully exercised so as to aid in the proper administration of the law by securing the best juries possible without illegal discrimination against any qualified citizen of the state. Illegal discrimination in selecting persons to serve as jurors affects the validity of the panel or venire as an entirety without reference to the impartiality of individual jurors on the panel. In the eyes of the law all persons of all races are regarded alike, and no person has any right to insist that a person of his race or color shall be on the jury by which he is tried when charged with crime, or when he is otherwise a party to an action or proceeding. But every person has a right to insist that officers of the law in selecting lists of names of persons to compose the juries in the courts shall not in such selection discriminate against any citizen subject to jury duty because of his race, color or previous condition of servitude, and if such officers do so discriminate they violate the constitution of the United States and the entire list of jurors so selected is vitiated and illegal. Montgomery v. State, 53 Fla. 115, 42 South Rep. 894; Virginia v. Rives, 100 U. S. 313, 323; State v. Brown, 119 Mo. 527, 24 S. W. Rep. 1027; 25 S. W. Rep. 200; Lewis v. State, Miss. 45 South. Rep. 360; State v. Casey, 44 La. Ann. 969, 11 South Rep. 583; Bullock v. State, 65 N. J. L. 557, 47 Atl. Rep. 62, S. C. 86 Am. St. Rep. 668; Lawrence v. Commonwealth, 81 V., 484; State v. Sloan, 97 N. C. 499, 2 S. E. Rep. 666.

On a former writ of error in this case (53 Fla. 115, 42 South. Rep. 894), it was held that an allegation that the "refusal of the sheriff to select any men of the African race to serve on the jury is on account of their race, color and previous condition of servitude," is a sufficient charge of discrimination to entitle defendant to prove it.[1] This is the law of the case and is applicable to both challenges now before the court.

Where testimony is admitted without objection in a judicial proceeding it is treated as received by consent. When so admitted the testimony, if not illegal, should be given all the probative force that its ordinary meaning and effect will afford. The testimony in support of the challenges is not full and clear; but it was admitted without objection and no testimony was offered in rebuttal. Under these circumstances the evidence adduced by the defendant in support of his challenges to the jurors should be given all the probative force and effect that the meaning of the testimony naturally and ordinarily affords to the mind without technical requirements or limitations. There is uncontroverted testimony that the people of one race and color are numerically in the majority in Duval county where the trial was had, and that about two-thirds of the men of that race are of fair character, sound judgment and intelligence, and fully qualified for jury duty; but that in the list of several hundred names drawn for duty, not more than half a dozen, if any, names of men of that race are found; and also that colored men were drawn on the juries when N. B. Broward was sheriff, but it has been a long time since men of that race have served on the jury in court. A portion of this testimony may be merely opinions or conclusions, but it was admitted without objection and was not impeached or contradicted in any way. If testimony that is not strictly admissible as distinguished from being illegal is admitted without objection, and it is not controverted in any way, the courts are not required to give such testimony a narrow or restrictive probative force and effect.

While the presumption is that the officers have legally discharged their duty in selecting and summoning the jurors under statutes that do not authorize any illegal discrimination, yet this is but a presumption that may be overcome by evidence to the

[1] The motion to quash, though verified, is not sufficient evidence of the facts therein charged. Martin v. Texas, 200 U. S. 316.

contrary. There is uncontroverted testimony that the people of one race and color are largely in the majority of the population in the county where the court was held; that about two-thirds of the men of that race are fully qualified for jury duty; that a list of several hundred names of men selected for jury duty for the year does not contain the names of a half dozen, if any, men of that race; that men of that race have served on the jury in the past in the county; and that the people of that race are engaged in pursuits that should improve their intellectual and moral condition. As there has been no change in the law that would exclude men of any race from jury duty, this evidence tended to show a discrimination on account of race or color; and such uncontroverted evidence is at least sufficient to require some proof that, notwithstanding the facts in evidence, there was no discrimination on account of race or color against any person of any race in the selection and summoning of the jurors. See Hubbard v. State, 43 Tex. Crim. Rep. 564, 67 S. W. Rep. 413; Whitney v. State, 43 Tex. Crim. Rep. 197, 63 S. W. Rep. 879; Eastling v. State, 69 Ark. 189, 62 S. W. Rep. 584; State v. Murray, 47 La. Ann. 1424, 17 South. Rep. 832; Haggard v. Commonwealth, 78 Ky. 366; Lewis v. State, Miss. 45 South Rep. 360.

As there was uncontroverted evidence tending to show discrimination against persons on account of race or color in the selection of jurors whose names were on the panels, sufficient to overcome the presumption in favor of the legality of the acts of the officers, the challenges interposed should have been sustained. See Smith v. State, 42 Tex. Cr. Rep. 220, 58 S. W. Rep. 97; Kipper v. State, 42 Tex. Cr. Rep. 613, 62 S. W. Rep. 420; Whitney v. State, 42 Tex. Cr. Rep. 283, 59 S. W. Rep. 895.

The judgment is reversed and the cause is remanded for further proceedings according to law.

CLINTON v. ENGLEBRECHT.

13 Wallace (U. S.), 434. [*1871.*]

Error to the Supreme Court of the Territory of Utah.

The principal question for consideration in this case was raised by the challenge of the defendants to the array of the

jury in the Third District Court of the Territory of Utah. * * *

The act of the Territorial legislature, passed in 1859, and in force when the jury in this cause was summoned, required that "the county court" in each county should make out from the assessment rolls, a list of fifty men qualified to serve as jurors; and that thirty days before the session of the District Court, "the clerk of said court" should issue a writ to the Territorial marshal or any of his deputies, requiring him to summon twenty-four eligible men to serve as petit jurors. These men were to be taken by lot, in the mode pointed out by the statute, from the lists previously made by the clerks of the county courts, and their names were to be returned by the marshal to the clerk of the District Court. Provision was further made for the drawing of the trial panel from this final list, and for its completion by a new drawing or summons in case of non-attendance or excuse from service upon challenge, or for other reason.

For the trial of the cause the record showed that the court originally directed a venire to be issued in conformity with this law, and that a venire was issued accordingly, but not served or returned. The record also showed that under an order subsequently made, an open venire was issued to the Federal marshal, which was served and returned with a panel of eighteen petit jurors annexed; the court, in making this order, acting apparently on the theory that it was a court of the United States, and to be governed in the selection of jurors by the acts of Congress. The jurors thus summoned were summoned from the body of the county, at the discretion of the marshal. Twelve jurors of this panel were placed in the jury-box, and the defendants challenged the array on the ground that the jurors had not been selected or summoned in conformity with the laws of the Territory and with the original order of the court. This challenge was overruled. Exception was taken, and the cause proceeded. Both parties challenged for cause. Each of the defendants claimed six peremptory challenges. * * *

The Chief Justice delivered the opinion of the court.

It is plain that the jury was not selected or summoned in pursuance of the statute of the Territory. That statute was, on the contrary, wholly and purposely disregarded, and the controlling question raised by the challenge to the array is, whether the law of the Territorial legislature, prescribing the mode of

obtaining panels of grand and petit jurors, is obligatory upon the District Courts of the Territory.

It was insisted in argument that the challenge to the array was waived by the defendants through the exercise of their right to challenge peremptorily and for cause; and we were referred to the judgment of the Supreme Court of New York, in the case of The People v. McKay (18 Johnson, 217) as an authority for this proposition. But that case appears to be an authority for the opposite conclusion. "We are not of opinion," says the court, "that the prisoner's peremptory challenge of jurors was a waiver of his right to object now to the want of a venire." In that case there had been no venire, but the jury had been summoned in a mode not warranted by law. In the case before us there was a venire, but if it was not authorized by law it was a nullity; and we are not prepared to say that the efforts of the defendants to secure as far as they could, by peremptory challenges and challenges for cause, a fair trial of their case, waived an inherent and fatal objection to the entire panel.

We are, therefore, obliged to consider the question whether the District Court, in the selection and summoning of jurors, was bound to conform to the law of the Territory. * * *

The process for summoning jurors to attend in such cases may be a process for exercising the jurisdiction of the Territorial courts when acting, in such cases, as Circuit and District Courts of the United States; but the making up of the lists and all matters connected with the designation of jurors are subject to the regulation of Territorial law. And this is especially true in cases arising, not under any act of Congress, but exclusively, like the case in the record, under the laws of the Territory.

There is nothing in this opinion inconsistent with the cases of Orchard v. Hughes (1 Wallace, 73), or of Hunt v. Palao (4 Howard, 589), properly understood. The first of these cases went upon the ground that the chancery jurisdiction conferred upon the courts of the Territories by the organic act was beyond the reach of Territorial legislation; and the second, in which the Territorial Court of Appeals was called a court of the United States, was only intended to distinguish it from a State court.

Upon the whole, we are of opinion that the jury in this case was not selected and summoned in conformity with law, and

that the challenge to the array should have been allowed.[1] This opinion makes it unnecessary to consider the other questions in the case.

Judgment reversed.

RHODES v. SOUTHERN RY. CO.

68 South Carolina, 494. [*1903.*]

Mr. Justice GARY. * * *

The second exception is as follows: "Because it is respectfully submitted, that his Honor erred in refusing to quash the panel of jurors upon the following grounds: (a) That the jury list of 'qualified electors' was not prepared by the county auditor, the county treasurer, and the clerk of the Court of Common Pleas, in Barnwell County, where said case was tried, as is required by law, but by the board of county commissioners and the clerk of the board of county commissioners, and that subsequent adoption and ratification of the acts of the said board of county commissioners and clerk, by the said county auditor, county treasurer, and clerk of the Court of Common Pleas, did not cure such illegal preparation of said list. (b) That the jury list required by law to be deposited with the ballots in the jury box, was not so deposited, but was found outside of the said box unenclosed, in the office of the clerk of said Court. (c) That what purported to be said jury list, when found, did not consist of one list but of two jury lists. (d) That the said jury lists were made out from the list of taxpayers and not from the qualified electors, as required by law."

We will first consider subdivision "a." The plaintiff introduced in evidence the affidavit of the county auditor, county treasurer and clerk of the Court, in which they stated. "That each of said commissioners being exceedingly busy with the manifold duties in their respective offices, at their own expense, employed R. C. Roberts, Jr., the clerk of the county supervisor, to make a list of the qualified electors of said county, under the

[1] And so in Lincoln v. Stowell, 73 Ill. 246.

But a challenge to the array can not be made after challenge for cause.

provisions of the Constitution, between the ages of twenty-one and sixty-five years, and of good moral character, and to furnish to the said commissioners for their action the said list, which was duly done by the said clerk. That upon the said names being furnished to the said commissioners by the said clerk, the said commissioners inspected the same and passed upon the qualifications of the persons whose names appear upon the said list; and the said board, upon the said investigation, judicially found that the said names included not less than one from every three of such qualified electors, under the provisions of said Constitution, and as far as their judgment advised, such parties are of good moral character and between the ages of twenty-one and sixty-five years, and living within the said county of Barnwell; and that the same, in the judgment of the said deponents, are all otherwise well qualified to serve as jurors, being persons, in their opinion, of sound judgment and free from all legal exceptions. That throughout the whole transaction the said R. C. Roberts, Jr., exercised none of the functions of this board; but only acted in pursuance of his employment as a clerk in the preparation of the lists of said qualified electors, and in no manner desired, nor did he usurp, any of the prerogatives of the said board, or relieve the said board of any of their liabilities or responsibilities to the public, under the law with reference to the drawing of said jurors. That the said board itself judicially passed upon the qualifications, as aforesaid, of each of the said electors, and their names were only placed in the jury box after their said fitness had been so determined. That upon the list of jurors so selected being accepted by the said board, they caused the names of the electors so accepted to be written, each on a separate paper or ballot, so as to resemble each other as much as possible, and so folded that the names written thereon, in their judgment, were not visible on the outside, and placed them with the said list in the regular jury box. * * * And in all other particulars the said jury box has been kept securely locked with three separate and strong locks with keys, etc., as required by law; and that at the same time the said deponents placed in a special apartment in the said jury box, known as the "Tales" box, the names of not less than one hundred nor more than four hundred of such persons whose names appeared on the said lists as reside within

five miles of the court house, and the names of such persons were likewise placed in the said jury box."

The fact that the clerk of the board of county commissioners prepared a list of the electors from the tax books, which was canvassed and revised by the proper officers, was a mere irregularity, and, therefore, an insufficient ground for quashing the array of jurors. In the case of State v. Massey, 2 Hill, 379, the defendant appealed upon the ground that the jury list had not been made from the tax returns according to the act of 1799. After citing the provisions of the act, the Court used this language: "This is purely directory to public officers in the discharge of their duty; if they fail to discharge it, and the jury is drawn from the old list, it does not vitiate the array, nor is it any objection to the polls. The jurors are still *boni et legales homines*. 2 Hawk P. C., book 2, Chap. 3, § 14. The party is not prejudiced if the jury for his trial are from the vicinage, the district where the offense is committed, and have all the other legal qualifications. It will be observed that the act does not declare a venire issued for jurors drawn from the old list to be void; nor does it direct the array to be quashed. It was not intended to secure any right, benefit or privilege to the defendant; it was merely to regulate the drawing of the jury in such a way as to divide the duty of serving upon the jury among the inhabitants of a district."

In Thompson & Merriam on Juries, sectional page 134, it is said: "Statutes which prescribe the time and manner of selecting the general list as described, are generally treated as directory. The primary object which they have in view is the just apportionment of jury duty among the citizens of the county or other jurisdiction, rather than the preservation of the rights of litigants. If the names of persons not qualified for this duty get inadvertently into this list, and if such names are drawn as members of the panel for a particular term, persons having litigation at that term have a complete remedy by challenging for cause any member of the panel of being disqualified or partial. The general rule, therefore, is that irregularities in the general list constitute no ground for challenging the array. Thus, if the officers charged with such duty fail to make the list as required by law, and the jury in default of such list is drawn from the old lists, this does not vitiate the array nor is it a cause

of challenge to the polls. If the jurors are qualified individually, the parties to suit are not prejudiced."[1]

Subdivision "b" will next be considered. In refusing the motion, the presiding judge said: "As to that list not being in the box, it appears from the facts of the case that it was left in the clerk's office; the clerk of the Court and perhaps the other member of the board thought it was in the box, it was introduced in open Court and appears to be regular." This was only another irregularity, and is disposed of by what was said in considering subdivision "a."

The same may be said of subdivision "c."

Subdivision "d" is disposed of by the fact that the presiding Judge found as a fact that the lists were made out from the qualified electors.

McGANN v. HAMILTON.

58 Connecticut, 69. [*1889.*]

CARPENTER, J. This case was tried to a jury in the City Court of New Haven. The defendant's attorney challenged the array of jurors on the following grounds. * * *

"Second, because the names of the jurors drawn were not put into the box to be drawn, on paper rolled up, but were on straight, unfolded slips of paper, which were not rolled up, but lay flat in the box."

The court disallowed the challenge. * * *

In respect to the second cause. The charter requires that the clerks of the City Court "shall write each juror's name thus chosen, fairly on a separate piece of paper, and roll up and put the same into a box, which he shall provide and keep for that purpose; and whenever the sheriff of said city, or the officer acting in his stead, shall receive a warrant from the clerk of said court to summon a jury, he shall, in the presence of the judge or assistant judge and clerk of said court, take out of said box as many papers as his warrant directs."

[1] Compare By. v. Schwab, 127 Ky. 82, where the panel was quashed because the commissioners permitted a third person to write the names and place them in the wheel.

The most that the court found on this point is what the clerk testified to, namely, "that when he had written the names of the jurors on separate pieces or slips of paper, he rolled about and shuffled the slips containing the names, before he put the same into the jury box, so that the order of drawing out the names from the jury box could not be foreknown."

The object of the charter was to make it impossible for the officer drawing the jurymen to exercise any partiality or discretion even. Had the directions of the charter been strictly followed it would have been impossible to have seen the names before drawing them, and the officer serving a jury warrant could not have exercised any choice or discretion by drawing names which he desired to draw, if any, or by omitting to draw names which he preferred not to draw, if any. As it was, the names of some of the jurors might have been on the upper side of the paper, and might have been seen; the names of others might have been on the under side and not seen. It was possible for him to see some of the names, and if for any reason he wished to draw them or omit drawing them, he could have done so. The presence of the judge and clerk could not prevent that; but, if the paper had been rolled up as directed, he could have had no choice, and the presence of the judge and clerk would have prevented or detected his drawing any more pieces of paper than his precept required, and thus fraud or partiality would have been impossible. The statute in precise terms told the clerk what to do. It did not permit him to exercise any discretion. He was not at liberty to substitute for the action required some other action which he might consider as good or better. Obedience was his first and only duty. Disobedience made it possible for the officer easily to defeat the object of the statute. The statute having directed the way in which the thing should be done, all the other ways were impliedly prohibited. We are constrained to hold, therefore, that the court erred in overruling the second cause of challenge.[1]

[1] See also Ins. Co. v. Adams, 110 Pa. St. 553, where panel was quashed because the jury wheel was not kept locked as directed by the statute.

(b) *Challenges to the Polls.*

(1) For Cause.

Tidd's Practice. 2 Am. Ed. 780.

Challenges to the polls, *in capita*, are exceptions to particular jurors; and according to Sir Edward Coke, they are of four kinds; first, *propter honoris respectum*, as if a lord of parliament be impaneled on a jury, in which case he may challenge himself, or be challenged by either party. Secondly, *propter defectum*, as if a juryman be an alien born, or a slave or bondman; so if he be not resident in the county, or have not the necessary qualification of estate. All incapable persons, as infants, idiots, and persons of non-sane memory, are likewise excluded upon this ground. Thirdly, *propter affectum*, as that a juror is of kin to either party, within the ninth degree; that he has been arbitrator, or declared his opinion on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict, or even eat and drank at either party's expense; that he has formerly been a juror in the same cause; that he is the party's master, servant, tenant, counsellor, steward, or attorney, or of the same society or corporation with him. All these are principal causes of challenge: Besides which, there are challenges to the favour, where the party objects only on account of some probable grounds of suspicion, as acquaintance, and the like; the validity of which must be left to the determination of triers,[1] who, in case the first man called be challenged, are two

[1] *Per Curiam* in O'Fallen Coal Co. v. Laquet, 198 Ill. 125. * * *

Upon the empaneling of the jury, counsel for defendant challenged one of the jurors "to the favor," and demanded triers, as at common law, to test his fitness. The Court disregarded the demand and proceeded to question the juror as to his competency. At the conclusion of that examination counsel again demanded triers, but the request was again denied and the juror held competent. This ruling of the Court is assigned for error. The practice here insisted upon is very unusual, to say the least. Under our practice the competency of a juror, whether raised by principal challenge or challenge to the favor as at common law, is triable by the Court without the intervention of triers, and the ruling of the trial court as to the competency of a juror is reviewable upon appeal of writ of error. We can see no good reason for departing from that practice. The common law method of trying challenges would

indifferent persons named by the court; and if they try one man and find him indifferent, he shall be sworn; and then he and the two triers shall try the next; and when another is found indifferent and sworn, the two triers shall be superseded, and the two first sworn on the jury shall try the rest. Fourthly, a juror may be challenged *propter delictum*, as for a conviction of treason, felony, perjury, or conspiracy; or if, for some infamous offense, he has received judgment of the pillory, tumbrel, or the like, or to be branded, whipped or stigmatized; or if he be outlawed or excommunicated, or hath been attainted of false verdict, praemunire, or forgery.

MYLOCK v. SALADINE.

1 Wm. Blackstone, 480. [*1764.*]

This was an action of trespass for false imprisonment in which the first verdict was set aside, as excessive. A rule was then obtained for a change of venue on affidavit showing prejudice against the defendant and a popular subscription to aid the plaintiff.[1]

LORD MANSFIELD, C. J. I have no doubt of the propriety of changing the venue, where an indifferent trial cannot be had, nor of the power of this Court to change it, when such a case appears. A juror should be as white paper, and know neither plaintiff nor defendant, but judge of the issue merely as an abstract proposition upon the evidence produced before him. He should be superior even to a suspicion of partiality. Upon the motion for a new trial, we were all clear from the Recorder's report, which was as sensible and good a one as ever was made

be cumbersome and attended with unnecessary delay in the trial of causes, without any beneficial results. It is said in the American and English Encyclopedia of Law (vol. 12, p. 357): Even where, as in New York, there is still a distinction between principal challenges and challenges to the favor, the Court is generally the trier of both, and the appointment of triers by the Court is almost universally obsolete. If the court committed an error in holding competent the juror objected to, notwithstanding the challenge by the defendant, it had the right to have that ruling corrected upon a proper assignment of error.

[1] Statement has been condensed.

to this Court, that the verdict was against the weight of evidence, and that there had been a popular run against the defendant. If the prejudice be general, though not universal, it is sufficient to warrant this rule. It is impossible for the defendant to come at particular facts, so as to form a case for a legal challenge. Here is no universal accusation of the citizens of Chester; only a well-grounded apprehension of danger arising from the general prejudice. The subscription indeed is denied in terms, but elusively. It is not denied that contributions were made; perhaps without any formal subscription. The opposition made to this motion, and the struggle against it, are sufficient to show that the plaintiff thinks he shall have an undue advantage. Otherwise there is not an iota difference, whether he tries it in the city or the county. The town is the same, the time the same, the expense exactly the same.

Rule made absolute.

O'CONNOR v. GILLASPY.

170 Indiana, 428. [*1907.*]

Action by an employee for personal injuries.

MONTGOMERY, J. * * * Parties litigant in cases of this class are entitled to a trial by a thoroughly impartial jury, and have a right to make such preliminary inquiries of the jurors as may seem reasonably necessary to show their impartiality and disinterestedness. In the exercise of this right counsel must be allowed some latitude, to be regulated in the sound discretion of the trial court, according to the nature and attendant circumstances of each particular case. The examination of jurors on their *voir dire* is not only for the purpose of exposing grounds of challenge for cause, if any exist, but also to elicit such facts as will enable counsel to exercise their right of peremptory challenge intelligently.

Questions addressed to this end are not barred though directed to matters not in issue, provided they are pertinent, and made in good faith. It does not appear from the record that an accident or indemnity insurance company was in any manner interested in this action, but the laws of this State authorize the in-

corporation of companies for indemnifying employers against liability for accidental injuries to employes, and it is a matter of common knowledge that numerous companies are engaged in such insurance in this State. Although the pertinency or relevancy of the inquiry does not affirmatively appear from the record, the circumstances mentioned forbid the assumption that counsel acted in bad faith and without some knowledge or information inducing a belief that such insurance company was interested in the result of the trial. We accordingly hold that the judge did not abuse his discretion or commit error in permitting appellee's counsel over objection to ask each juror upon his *voir dire* whether he or any member of his family was in anywise interested as stockholder, officer or agent of the Aetna Insurance Company, or of any insurance company engaged in the business of insuring against accidents. Brusseau v. Lower Brick Co. (1907), 133 Iowa 245, 110 N. W. 577; Foley v. Cudahy Packing Co. (1903), 119 Iowa 246, 93 N. W. 284; Viou v. Brooks-Scanlon Lumber Co. (1906), 99 Minn. 97, 108 N. W. 891; Antletz v. Smith (1906), 97 Minn. 217, 106 N. W. 517; Spoonick v. Backis-Brooks Co. (1903), 89 Minn. 254, 94 N. W. 1079; Howard v. Beldenville Lumber Co. (1906), 129 Wis. 98, 108 N. W. 48; Faber v. C. Reiss Coal Co. (1905), 124 Wis. 554, 102 N. W. 1049; Cripple Creek Mining Co. v. Brabant (1906), 37 Colo. 423, 87 Pac. 794; Vindicator, etc., Mining Co. v. Firstbrook (1906), 36 Colo. 498, 86 Pac. 313; Swift & Co. v. Platte (1903), 68 Kan. 1, 72 Pac. 271, 74 Pac. 635; Dow Wire Works Co. v. Morgan (1906), (Ky.), 96 S. W. 530; Blair v. McCormack Const. Co. (1907), 107 N. Y. Supp. 750.[1]

[1] Accord. Gatzow v. Buenving, 106 Wis. 1; Comm. v. Thresker, 11 Gray, 55. But an unreasonable and suggestive examination should not be permitted. Howard v. Lumber Co., 129 Wis. 98.

Harlan, J., in Connors v. U. S., 158 U. S. 408: "Particular stress is laid upon the refusal of the Court to allow the question to jurors, 'Would your political affiliations or party predilections tend to bias your judgment in this case either for or against this defendant?' In the absence of any statement tending to show that there was some special reason or ground for putting that question to particular jurors called into the jury box for examination, it cannot be said that the Court erred in disallowing it. If the previous examination of a juror on his *voir dire* or the statement of counsel, or any facts brought to the attention of the Court had indicated that the juror might, or possibly would, be influenced in giving a verdict by his political surroundings, we would not

BURT v. PANJAUD.

99 U. S. 180. [*1878.*]

Ejectment. Begun in the State Court in Florida and removed to the Circuit Court of the United States.[1]

Mr. Justice MILLER delivered the opinion of the Court. A bill of exceptions presents the errors we are called upon to examine.

It appears that, before the jury was sworn to try the case, one of the panel, Henry Holmes, was sworn on his *voir dire*, and was asked whether or not he had aided or abetted the late rebellion against the United States, when he was told by the presiding judge that it was optional with him whether he would answer the question or not; and said Holmes declined to answer. The defendant excepted to this ruling, and then moved that Holmes be excluded for cause, which the court overruled, and defendant excepted again.

It appears affirmatively that Holmes was not sworn as one of the jury, and no reason is given for it.

1. We are of opinion that, since Holmes did not sit on the jury, no harm was done to defendant. The object of both motions was to exclude him as one incompetent to sit. It is immaterial to the defendant how this was brought about. It is possible that if defendant had shown affirmatively that he was excluded by reason of his peremptory challenge, and that in doing so the exercise of his right of peremptory challenge had been abridged, the result might be otherwise. It is sufficient to say that the record does not show that he was on the jury, but in fact that he was not, or that in getting rid of him any right of defendant was abridged or lost.

2. But we are further of opinion that a juror is no more than a witness obliged to disclose on oath his guilt of any crime, or

say that the Court could not properly, in its discretion, if it had regarded the circumstances as exceptional, have permitted the inquiry whether the juror's political affiliations or party predilections would bias his judgment as a juror. But no such exceptional circumstances are disclosed by the record, and the Court might well have deemed the question—unaccompanied by any statement showing the necessity for propounding it—as an idle one that had no material bearing upon the inquiry as to the qualifications of the juror, and as designed only to create the impression that the interests of the political party to which the accused belonged were involved in the trial."

[1] Statement has been condensed.

of any act which would disgrace him, in order to test his qualification as a juror.[2] The question asked him, if answered in the affirmative, would have admitted his guilt of the crime of treason. Whether pardoned by a general amnesty or not pardoned, we think the crime was one which he could not be required to disclose in this manner. Nor would this ruling deprive the party of his right of challenge. Like a conviction for felony, or any other disqualifying circumstance, the challenger was at liberty to prove it by any other competent testimony.

He did not offer to do this, and as the juror's incompetency was not proved, the court was not bound to exclude him.

DUNBAR v. PARKS.

2 Tyler's Rep. (Vt.) 217. [*1802.*]

The plaintiff brought trover for a horse. On the trial of the issue to the jury, after the examination of all the witnesses on the stand, and before argument, Mr. Sias, one of the jurors, observed to the Court that he knew some matters which had relation to the cause; and requested information whether it would be improper for him to communicate his knowledge to his brethren of the panel after they were charged, and should retire to the jury-room.

Curia. As the juror had a doubt in his mind relative to his conduct, it is highly commendable in him to apply to the Court for advice. Let the witness's oath be administered to him.[1]

He was accordingly sworn, and testified, standing in the jury-box, to a material fact.

Upon his cross-examination,

John Mattocks, counsel for the plaintiff, put a question to the witness, the answer to which would indicate for which party as a juror he would eventually decide.

Sed per Curiam. This must not be suffered. Examine the witness solely as to facts, and such as came to his knowledge before he was sworn as a juror.

[2] On this ground it was formerly thought improper in a criminal case to ask a juror whether he had expressed an opinion that the defendant was guilty. Rex v. Edmonds, 4 B. & Ald. 471.

[1] See also, Wright v. Crump, 7 Mod. 1, *post*, p. 318n.

STATE v. STENTZ.

30 Washington, 134. [*1902.*]

WHITE, J. The information in this case was filed by the prosecuting attorney of Spokane county on November 5, 1901, charging the appellant with the crime of manslaughter. * * *

On the information, the name of R. M. Sperry, among others, was indorsed as a witness for the state. While impaneling the jury in the cause, said R. M. Sperry was drawn as a juror, and, upon being questioned as to his competency, testified in substance that he knew the defendant by sight, and that he had no opinion as to the defendant's guilt or innocence. This question was then asked him by the prosecuting attorney: "I ask you to state whether or not from any cause, whether I have mentioned it or not, you would be hindered or impeded in giving a fair and impartial trial to the defendant." He answered: "The only cause is that I am liable to be a witness in the case. For that reason, I guess I would not be eligible to sit on the jury." He further testified that that fact would not prejudice or bias him for or against the defendant, and that he felt satisfied he could give the defendant a fair and impartial trial. On cross-examination, he said he had not been subpoenaed as a witness, but he "distrusted that there was a subpoena issued for him which had not yet been served"; that "some of the prosecuting attorneys had talked with him with reference to something in the case." The following appears from the record:

"Mr. Nuzum (for the defendant): I submit, your Honor, that this juror's name appears as a witness in this information—indorsed on the information, and although the subpoena has not been served on him, his name appears here as one of the witnesses for the state, and we submit a challenge for cause. * * *

"Mr. Sullivan: I think when the prosecutor says if he is called on the jury he will not call him as a witness, I think that ought to disqualify the juror; they have talked to him, we haven't.

"The Court: The challenge is denied.

"Defendant excepts. Exception allowed." * * *

[The defendant used his last peremptory challenge to this

juror. In the trial Sperry was called as a witness and gave material testimony.] [1]

A witness called upon to testify to such facts might not be incompetent as a juror, but a witness who knows about the controverted facts in the case—the *res gestæ*, as we might say—such a reckless driving of the accused on the public highway immediately preceding the commission of the offense, a short distance from where the offense was committed, it seems to us knew material, controverted facts that would of necessity bias and influence his judgment as a juror. To permit such a person to sit upon the jury was to deprive the accused of a trial by an impartial jury. It is true that we have a statute that declares:

"A juror may be examined by either party as a witness, if he be otherwise competent. If he be not so examined, he shall not communicate any private knowledge or information that he may have of the matter in controversy to his fellow jurors, nor be governed by the same in giving his verdict." Section 5001, Bal. Code.

This section must be construed in connection with the constitutional guaranty to an accused person of an impartial trial, and the statutes relative to challenging jurors. The law, by simply declaring that a juror shall not be governed by any knowledge that he may have of the facts, does not obviate the bias that may really exist in the mind of the juror. A juror may be challenged for actual bias. Section 4988, Bal. Code. Actual bias is defined as "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the trier, in the exercise of a sound discretion, that he (the juror) cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." Section 4983, Bal. Code. Can it be said that, if the court had known of the knowledge of this juror of the controverted facts in the case, it would have allowed him to act as a juror? We think not. If the court had known the facts as to the knowledge of the juror, and had not sustained a challenge for actual bias, we think it would have been an abuse of sound discretion. * * * It is a violation of the defendant's constitutional rights to deny his challenge to a juror who has formed, from newspaper accounts, an opinion as to the defendant's guilt, where it would

[1] Inserted by the Editor.

take strong evidence to change such opinion, even though the juror says he could lay aside his opinion, and try the case wholly upon the evidence, as if he had heard nothing about it. State v. Murphy, 9 Wash. 204 (37 Pac. 420). It needs no argument to show that it would require strong evidence to remove from the juror Sperry's mind the fact that the accused was driving recklessly along the highway just preceding the commission of the offense, and that this was an important fact as to his guilt. The juror Sperry seemed to realize this fact himself, judging from his answers. If all the jurors who tried the cause had been personally cognizant of the same facts, as the juror Sperry, conviction would inevitably have followed, and, as was said in the case of State v. Murphy, *supra*, "the trial would have been little less than a farce, and our boasted constitutional privilege of a trial by an impartial jury would be a privilege existing more in theory than practice." The discretion of the trial court to determine partially or impartially in a jury is subject to review by the Appellate Court under the constitutional guaranty to the accused of a trial by an impartial jury. State v. Rutten, 13 Wash. 203 (43 Pac. 30).[2] A refusal to sustain challenges for proper cause, necessitating peremptory challenges on the part of the accused, will be considered on appeal as prejudicial where the accused has been compelled subsequently to exhaust all his peremptory challenges before the final selection of the jury. In as much as the appellant was compelled to get rid of the juror Sperry by a peremptory challenge, the accused was deprived of one peremptory challenge to which he was by law entitled. For that reason the judgment of the court is reversed and the cause remanded for a new trial.

REYNOLDS v. UNITED STATES.

98 U. S. 145. [*1878.*]

Mr. Chief Justice WAITE delivered the opinion of the court. * * * 2. As to the challenges by the accused.

[2] In the omitted parts of the opinion the Court reviewed Commonwealth v. Joliffe, 7 Watts 585; Hardin v. State, 66 Ark. 53; Atkins v. State, 60 Ala. 45; Baldwin v. State, 111 Ala. 11; State v. Barber, 113 N. C. 711; White v. State, 73 Miss. 50; Fellows Case, 5 Greenl. 333; State v. Martin, 28 Mo. 530.

By the Constitution of the United States (Amend. VI.) the accused was entitled to a trial by an impartial jury. A juror, to be impartial, must, to use the language of Lord Coke, "be indifferent as he stands unsworn." Co. Litt. 155 b. Lord Coke also says that a principal cause of challenge is "so called because, if it be found true, it standeth sufficient of itself, without leaving anything to the conscience or discretion of triers" (id. 156b); or, as stated in Bacon's Abridgement, "it is grounded on such a manifest presumption of partiality that, if found to be true, it unquestionably sets aside the * * * juror." Bac. Abr., tit. Juries, E. 1. "If the truth of the matter alleged is admitted, the law pronounces the judgment; but if denied, it must be made out by proof to the satisfaction of the court or the triers." Id. E. 12. To make out the existence of the fact, the juror who is challenged may be examined on his *voir dire*, and asked any questions that do not tend to his infamy or disgrace.

All of the challenges by the accused were for principal cause. It is good ground for such a challenge that a juror has formed an opinion as to the issue to be tried. The courts are not agreed as to the knowledge upon which the opinion must rest in order to render the juror incompetent, or whether the opinion must be accompanied by malice or ill-will; but all unite in holding that it must be founded on some evidence and be more than a mere impression. Some say it must be positive (Gabbet, Criminal Law, 391); others, that it must be decided and substantial (Armistead's Case, 11 Leigh (Va.), 659; Wormley's Case, 10 Gratt. (Va.) 658; Neely v. The People, 13 Ill. 685); others, fixed (State v. Benton, 2 Dev. & B. (N. C.) L. 196); and, still others, deliberate and settled (Staup v. Commonwealth, 74 Pa. St. 458; Curley v. Commonwealth, 84 Id. 151). All concede, however, that, if hypothetical only, the partiality is not so manifest as to necessarily set the juror aside. Mr. Chief Justice MARSHALL, in Burr's Trial (1 Burr's Trial, 416), states the rule to be that "light impressions, which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him." The theory of the law is that a juror who has formed an opinion can-

not be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the "conscience or discretion" of the court.

The challenge in this case most relied upon in the argument here is that of Charles Read. He was sworn on his *voir dire;* and his evidence, taken as a whole, shows that he "believed" he had formed an opinion which he had never expressed, but which he did not think would influence his verdict on hearing the testimony.[1] We cannot think this is such a manifestation of par-

[1] The examination of the juror Read was as follows:

Q. "Have you formed or expressed any opinion as to the guilt or innocence of this charge?"

A. "I believe I have formed an opinion."

By the Court: "Have you formed and expressed an opinion?"

A. "No, sir; I believe not."

Q. "You say you have formed an opinion?"

A. "I have."

Q. "Is that based upon evidence?"

A. "Nothing produced in court."

Q. "Would that opinion influence your verdict?"

A. "I don't think it would."

By Defendant: "I understood you to say that you had formed an opinion, but not expressed it."

A. "I don't know that I have

tiality as to leave nothing to the "conscience or discretion" of the triers. The reading of the evidence leaves the impression that the juror had some hypothetical opinion about the case, but it falls far short of raising a manifest presumption of partiality. In considering such questions in a reviewing court, we ought not to be unmindful of the fact we have so often observed in our experience, that jurors not unfrequently seek to excuse themselves on the ground of having formed an opinion, when, on examination, it turns out that no real disqualification exists. In such cases the manner of the juror while testifying is often times more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case. The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside, and it will not be error in the court to refuse to do so. Such a case, in our opinion, was not made out upon the challenge of Read. The fact that he had not expressed his opinion is important only as tending to show that he had not formed one which disqualified him. If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed. Under these circumstances, it is unnecessary to consider the case of Ransohoff, for it was confessedly not as strong as that of Read.

IRVINE v. KEAN.

14 Sergeant & Rawle, 292. [*1826.*]

Per Curiam. There is but one exception in this case which appears to the court to be of any weight. The admission of Jacob Cramer as a witness was right, and the charge of the

expressed an opinion; I have formed one."

A. "I do."

Q. "Do you now entertain that opinion?"

President of the Court of Common Pleas, to the jury was correct. But the plaintiffs challenged Francis McEwen, a juror, who being called objected himself to being sworn, "because he had heard all the evidence at the former trial, and had made up and expressed his opinion on the facts then given in evidence, but said that his mind was always open to conviction, on another state of facts." The court overruled the challenge. This juror, if he had been on the former jury, would have been liable to a challenge, yet, in that case, his mind might have been open to conviction, if different evidence had been given on the second trial. But the law presumes that a man who has once made up his mind, especially if he has delivered it to others, will not be perfectly impartial. The presumption is a safe one, and generally accords with the truth. In the present case it was impossible to say whether any new evidence would be given; and therefore, from the juror's own account of the state of his mind, it would have been hazardous to permit him to be sworn. It is objected, that if this rule prevails, it will be difficult to procure a jury in any case which has been the subject of much conversation, because every man forms some opinion upon the state of facts which he has heard. It is very true that men generally form an opinion upon the case as it comes to their knowledge; but, when that knowledge is derived from common report, any sensible man knows the uncertainty of such reports, and keeps his mind open to a change of opinion when the whole truth shall be ascertained. Upon this principle, it was held by the Supreme Court of New York, 8 Johns. 445, to be no cause for challenge that the juror had said, "if the report of the neighbors was true, the defendant was in the wrong." The case before us is very different, where there had been a former trial, in which it must be supposed that all the evidence in the power of the parties had been produced. On the trial of Aaron Burr, Chief Justice MARSHALL laid down the rule, "that to have made up and delivered an opinion that the prisoner entertained the treasonable designs with which he was charged, and that he retained those designs and was prosecuting them when the act charged in the indictment was alleged to have been committed, was good cause of challenge." (1 Burr's Trial, 419, 420.) It is the opinion of the court, that after the impression made on the mind of McEwen by the first trial, there was danger of his no longer being perfectly impartial; and it being altogether uncertain whether the

state of the facts would be altered on the second trial, the plaintiff's challenge ought to have been allowed. The judgment is therefore to be reversed, and a venire *de novo* awarded.

CHICAGO, ETC., RY. CO. v. ADLER.

56 Illinois, 344. [*1870.*]

Mr. Justice WALKER delivered the opinion of the court:

This was an action brought by appellee to recover a penalty against appellants for the failure to ring a bell or sound a whistle at the crossing of a highway with their engine and trains. The suit was instituted under the one hundred and thirty-eighth section of the railroad law of the 5th of November, 1849. On the trial in the court below, the jury found a verdict for $1,150, for various breaches of the statute, upon which a judgment was rendered.

It is first urged, that the court below erred in refusing to allow the peremptory (?) challenges of jurors made by appellants. Four of the jurors who tried the case were asked on their *voir dire* if the evidence were evenly balanced, which way they would incline to find, and each answered that he would, in such case, lean against the defendants, and one of them stated he would do so because the company were able to stand it, and he thought a private individual should "have a little mite the advantage."

It is a fundamental principle, that every litigant has the right to be tried by an impartial and disinterested tribunal. Bias or prejudice has always been regarded as rendering jurymen incompetent. And when a juror avows that one litigant should have any other than the advantage which the law and evidence give him, he declares his incompetency to decide the case. He thereby proclaims that he is so far partial as to be unable to do justice between litigants, or that he is so far uninformed, and his sense of right is so blunt, that he can not perceive justice, or, perceiving it, is unwilling to be governed by it.

The rule is so plain and manifest that the party claiming to recover must prove his cause of action, it is a matter of surprise that an adult can be found who would not know that such is

the common sense as well as the common honesty of the rule. No ordinary business man would be willing that a claim pressed against him should be allowed, and he be compelled to pay it, when the evidence for and against the claim was evenly balanced. And how such men can bring themselves to apply a different rule, as jurors, to the rights of others, is incompatible with the principles of justice. Nor does the fact that jurors, who avow, under oath, that they would incline to favor a recovery by the plaintiff on evidence evenly balanced, declare that they are impartial, in the slightest degree tend to prove their impartiality. Their statement only tends to prove that they are so far lost to a sense of justice, that they regard what all right-thinking men know to be wrong, as just and impartial. To try a cause by such a jury is to authorize men who state that they will lean, in their finding, against one of the parties, unjustly to determine the rights of others, and it would be no difficult task to predict, even before the evidence was heard, the verdict that would be rendered. Nor can it be said that instructions from the court would correct the bias of jurors who swear that they incline in favor of one of the litigants. In suits for the recovery of penalties, the law does not warrant a recovery, unless the proof clearly preponderates in favor of the plaintiff. And to admit jurymen, who avow that they will not even require a preponderance, would be to violate the rule. The objection was well taken to the jurors, and the court erred in permitting them to act on the trial below.

McCARTHY v. THE CASS AVENUE RY. CO.

92 Missouri, 536. [*1887.*]

BLACK, J. The plaintiffs are the parents of John McCarthy, an unmarried minor. Their cause of action is based upon alleged negligence in violating an ordinance of the city of St. Louis, by which drivers and conductors of street cars are required to keep a vigilant watch for persons on foot, and especially children, either on the track or approaching the same, and, upon the first appearance of danger to such persons, to stop, in the shortest time and space possible.

The first contention is that the court erred in overruling the plaintiff's challenge to four jurors for cause. The examination of one of them will present the question as to the others, and, as reported in the bill of exceptions, is as follows: Upon a special jury of eighteen being called and sworn, plaintiff's counsel asked juror Sawyer whether, in an action brought to recover damages under the statutes of Missouri, on account of killing a person, he would have any bias or prejudice one way or the other; the juror answered that he did have a bias against such a case—that he was prejudiced against all damage cases. Being asked if such bias existed at this time, he answered that it did. Asked if it would require evidence to remove said prejudice in this case, he said in answer: "Well, I suppose there would have to be evidence anyway"—that it would require strong evidence.

Counsel for the plaintiffs then made his challenge for cause, and, thereupon, the court asked the juror if he could hear the evidence in the case and render a verdict according to the law and the evidence; the juror answered that he believed he could. By the court: "Suppose a case in hand, one in which the evidence, in other respects, sustains plaintiff's cause of action, could you, under the evidence and instructions of the court, give the plaintiff a verdict?" Answer: "Yes, sir."

Plaintiff's counsel then asked: "My question still is, would the prejudice that exists in your mind now, against all damage suits, including this, be such that it would require evidence to remove it before you could find a verdict for plaintiffs?" Answer: "If you will allow me I will answer it in this way—if the evidence went to show that the party was entitled to damages, then as a matter of justice, I would be in favor of awarding damages; otherwise, I could not." Q. "Would you start into the case with a prejudice against it which would require evidence to remove?" A. "Not in this case. I have no prejudice against this case, because I don't know anything about it."

It is not every opinion of a juror concerning the matter in litigation, which will operate as a disqualification. To have that effect, it must be such an opinion as will influence his judgment in the consideration of the cause. This is substantially the rule of the statute. Sec. 2796. Opinions formed, but not of a fixed character, and which readily yield to evidence, do not disqualify the juror. State v. Walton, 74 Mo. 270. If he have such a bias or prejudice against a class of cases that his

judgment will be warped, then he should be set aside and not accepted as a juror; but it ought to appear that his bias is such as to influence his judgment.

Again, the competency of a juror is a mixed question of fact and law. It is for the court to try this question of fact, and the finding of the trial court as to the competency of the juror ought not to be disturbed, unless it is clearly and manifestly against the evidence. This rule is to be deduced from what has been heretofore said by this court. State ex rel. v. National Bank, 80 Mo. 626; Montgomery v. Railroad, 90 Mo. 446.

Now, from the examination of the juror in this case, it clearly appears that he had no opinion as to this case. His evidence, as a whole, shows that he was opposed to unfounded personal damage suits; but if the evidence showed that the plaintiffs were entitled to damages, then he would be in favor of awarding them. What more could be asked of any juror? But applying the rule before asserted, it becomes clear that we ought not to disturb the finding of the circuit court, as to the competency of these jurors.[1]

NORTHERN PACIFIC R. R. CO. v. HERBERT.

116 U. S. 642. [*1885.*]

Mr. Justice FIELD delivered the opinion of the court. After stating the facts as above reported,[1] he continued:

1. As to the challenge to a juror. It appears that one Weaver, summoned as a juror, testified that he was a lumber dealer, and that the company gave him a place on its right of way for a lumber yard, without rent, and also that he had heard the accident to the plaintiff spoken of and explained. It was not shown, however, that he had any actual bias for or against either party, or any belief or opinion touching the merits of the case. He was, nevertheless, challenged, and the allowance of the challenge constitutes the first error assigned. It does not appear whether

[1] See Anson v. Dwight, 18 Ia. 241. Where the examination discloses a strong bias, the Court should not be influenced by the juror's professed ability to disregard it. Theobald v. Transit Co., 191 Mo. 395.

[1] For a statement of this case, see *post*, 689.

the challenge was for cause or was peremptory. Under the statute of Dakota each party is entitled to three peremptory challenges. It is for the party asserting error to show it; it will not be assumed. But if we regard the challenge as for cause, its allowance did not prejudice the company. A competent and unbiased juror was selected and sworn, and the company had, therefore, a trial by an impartial jury, which was all it could demand. United States v. Cornell, 2 Mason, 104; Heaston v. Cincinnati & Fort Wayne Railroad Co., 16 Ind. 275, 279; Atchison, Topeka & Sante Fe Railroad Co. v. Franklin, 23 Kansas, 74; Carpenter v. Dame, 10 Ind. 125, 130; Morrison v. Lovejoy, 6 Minn. 349, 350.[1]

HILDRETH v. CITY OF TROY.

101 New York, 234. [*1886.*]

ANDREWS, J. This action was brought to recover for injuries sustained by the plaintiff from the negligence of the defendant in failing to keep Congress street in the city of Troy in safe condition for travel, and resulted in a verdict for the plaintiff for $1,800. It appears that upon the impaneling of the jury, the plaintiff "excused" eight jurors drawn from the regular panel, residents of the city of Troy, upon the ground that they were interested in the result of the action, to which proceeding the city attorney objected on the ground that residents and taxpayers of the city are not disqualified as jurors in city cases, if otherwise competent. The court overruled the objection and held that all such jurors were disqualified, to which ruling the attorney for the defendant excepted. Thereafter four additional jurors, residents of the city, were drawn and the same proceeding was had, and they were likewise excluded. The jury box was filled from other names in the panel, and none of the jurors who sat were objected to or challenged. It is not claimed that the jurors excluded by the ruling of the court were interested except as taxpayers of the city. By the rule of the com-

[1] And so in State v. Reynolds, 171 Mo. 552; Glasgow v. Ry., 191 Mo. 347.

mon law the inhabitants of a municipality, or the members of any body politic, were incompetent to sit as jurors in a case in which the corporation was a party. They were deemed to be interested and such interest was a good cause of principal challenge. (Coke upon Littleton, 157, a, b.) The common law has been modified in this State by general statutes making the inhabitants of a town or county competent jurors in suits brought by or against such town or county (1 R. S. 357, § 4; id. 384, § 4; 2 id. 420, § 58), and as to the inhabitants of cities, by special provision, inserted in nearly all cases, in the charters of incorporation. The charter of Troy, enacted in 1816, provides: "That upon the trial of any issue, or upon the taking or making of any inquisition, or upon the judicial investigation of any facts whatever, to which issue, inquest or investigation the mayor, recorder, aldermen and commonalty of said city are a party, or in which they are interested, no person shall be deemed an incompetent juror by reason of his being an inhabitant, freeholder or freeman of the said city." (Chap. 1, § 16, Laws of 1816.) This provision has never been repealed or amended, and was in force at the time of the trial of this action. The ruling of the learned trial judge excluding from the jury the residents of Troy on the ground of interest, was in contravention of this explicit provision of law and was plainly erroneous.

The question presented is, whether the error of the judge is ground for the reversal of the judgment. The proceeding on the part of the plaintiff was in substance a challenge. It was so treated by the attorney for the city and by the court. The court ruled that residents of the city were legally disqualified as jurors, and excluded them on that ground alone. The right of a party to except to a determination of the court upon a challenge to a juror, and to have such determination reviewed on appeal is expressly given by the Code (§ 1180). This section recognizes the determination of a challenge as involving a legal right, which may be reviewed and, if erroneous, set aside. The General Term disposed of the question on the ground that the rejection of a competent juror was not ground of error, where the jurors who actually try the case are competent. We cannot assent to this view. In our judgment the adoption of this principle would seriously imperil the system of jury trial and lead to practices which the statutes regulating the drawing of jurors were designed to prevent. The main purpose of the statutes for the drawing

and selection of trial jurors is the securing of a fair and impartial jury. To this end, provisions are made, which, if followed, prevent the selection of a jury either by the court, or the officers of the court, or by either of the parties to the action, and exclude from the jury box all jurors not indifferent, or who for any reason are disqualified to act as jurors; while at the same time they secure to the parties the advantage of a jury constituted by lot from all the qualified jurors undrawn on the panel. By the Stat. 3, Geo. II, § 11, "for the better regulation of juries," it is provided that the first twelve persons drawn, and appearing, and approved as indifferent, should be the jury to try the case. This provision was incorporated into the Revised Laws of 1813 (1 R. L. 331, § 20), and into the Revised Statutes (2 R. S. 420, § 61), and was re-enacted in the Code of Civil Procedure (§ 1166), without any substantial change. The section of the code is in this language: "The first twelve persons who appear as their names are drawn, and called, and approved as indifferent between the parties, and not discharged or excused, must be sworn; and constitute the jury to try the case." Sections 1032 and 1033 enumerate causes for which jurors may be discharged or excused. The language of section 1166 is mandatory. Blackstone refers with just admiration to the safeguards thrown around the selection of a jury by the English statutes, and observes that they are admirably designed for the avoiding of frauds and secret management, by electing the twelve jurors out of the whole panel by lot. (2 Bl. Com. 365.) It is said that no injury resulted to the defendant from the erroneous exclusion of the city jurors, since a competent jury actually tried the case. The court cannot say that the trial would have resulted differently if the city jurors had not been excluded. On the other hand the contrary cannot be affirmed. It is certain that except for the erroneous ruling the jury would have been differently constituted. Jurors differ in intelligence, judgment, and fitness to act as jurors. It is, we think, the legal right of a party to have the jury selected from the competent names in the jury box, and that the range of selection shall not be limited by excluding without cause competent jurors from the panel. It cannot be doubted that if an incompetent juror had been admitted against the objection of the defendant, the judgment would be set aside, and yet in many cases it would be impossible to show any actual injury. A person not a resident of the county, or over sixty years of age, or with-

out the requisite property qualification, is not a competent juror (Code, § 1027), but it would, we conceive, be no answer to an exception taken to his admission, that no actual injury was shown to have resulted. The violation of the legal right of the party to have the case tried by competent jurors, would be conclusive. The error in this case was in improperly rejecting competent jurors. The court added a disqualification, not only not found in the statute, but which the statute declares shall not constitute a disqualification. The law allows in a civil case two peremptory challenges to each party. The action of the court was equivalent to allowing the plaintiff fourteen peremptory challenges, because it excluded from the jury without adequate cause, upon the motion of plaintiff, fourteen jurors presumably competent. If the court had in form allowed the plaintiff more than two peremptory challenges, would it be an answer to an exception, that nevertheless there was no legal injury, since a competent jury was subsequently impaneled? We think the error of the court in excluding the city jurors is available to the defendant on this appeal. The learned trial judge doubtless decided the point under the misapprehension that the case was governed by the common law, without having in view the Statute of 1816. But the charter is declared on its face to be a public act, and the judge is presumed to have had notice of its provisions. It does not appear whether his attention was specially called to the provision in Section 16, but the counsel for the plaintiff took the objection to the jurors specifically on the ground that as residents of Troy they were interested, and so disqualified, and the defendant's counsel insisted that they were not disqualified for that reason, and the court ruled the point for the plaintiff. We think he must bear the consequences of the error, and that he cannot escape by charging the defendant with a violation of duty in omitting to call the attention of the court to the provision of the Statute of 1816, which, so far as appears, may not have been known to him at the time. The judgment should be reversed. The statute makes elaborate provision for securing an impartial jury. It provides that the first twelve competent jurors drawn, who are indifferent and not discharged or excused, shall constitute the jury. The law prescribes the qualifications of jurors. The court cannot add to, or detract from them. It cannot itself select the jury, directly or indirectly. It cannot in its discretion, or capriciously, set aside jurors as incompetent, whom the law

declares are competent, and thus limit the selection of a jury to jurors whose names may be left. If this is done, a legal right is violated, for which an appellate court will give redress. The jury system to be successfully administered, requires not only absolute impartiality in fact, in the drawing of jurors, but such an adherence to forms and methods of procedure as will secure public confidence and prevent any suspicion of improper or unfair dealing.

We have not lost sight of the cases holding that a mere irregularity on the part of ministerial officers in the selection and drawing of jurors is not ground of error, unless it appears that it operated to the prejudice of the party. (Friery v. People, 2 Keyes, 424, 425; Ferris v. People, 35 N. Y. 125; People v. Ransom, 7 Wend. 417.) But the erroneous exclusion by a judge on the trial from a particular panel, of a class of persons regularly drawn, on the ground of incompetency, stands, we think, upon a different principle and is governed by different considerations. The judgment should be reversed. All concur.[1]

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(2) Peremptory Challenges.

STATE v. POTTER.

18 Connecticut, 166. [*1846.*]

WILLIAMS, C. J. * * * 2. Again it is said the prisoner has been deprived of a right to a peremptory challenge, which he was entitled to.

It is not denied that time and opportunity were given to the prisoner to challenge a juror; but it is claimed that he had not all the time the law allows him. Dickerman, a talesman, had been examined, and there was no cause of challenge known against him. The court then told the counsel if they intended a peremptory challenge they must make it at that time. They had then a reasonable opportunity to make their challenge; but they claim they may make it at their own time, provided it is done before the jurors are sworn. The statute, it is said, gives them power

[1] And so in Searle v. Bishop of Springfield, 203 Mass. 492.

to challenge peremptorily twenty jurors summoned and impanelled,—and much criticism has been had upon the word "impanelled." It is claimed that it means the jury sworn to try the cause; and that until sworn they are not impanelled.

That they form a jury when thus impanelled, is true; but that they are not impanelled until sworn, is not true. On the other hand we learn from high authority that a jury are said to be impanelled when the sheriff has entered their names into the panel—a little piece of parchment. Co. Litt. 158 b.

The Statute of 3 Geo. II says, a sheriff shall not return a separate panel for every separate cause, but one and same panel for every cause. 3 Bla. C. 358. And we can hardly open a book upon the subject but it speaks of the panel returned by the sheriff. 4 M. & Sel. 467.

A prisoner has, by statute, a right to a copy of the panel, in certain cases, before the time of trial. 3 Bac. Ab. 742, tit. Juries, B. 8 (Gwil, ed.). If it applied only to jurors sworn, then it would imply that jurors might be challenged after they were sworn, which is not claimed.

But it is said the clerk informs the prisoner that if he would challenge them, or any of them, before they are sworn he shall be heard. This certainly is the form. We understand it to mean that his challenges must be made before the jurors are sworn; but we do not suppose that the prisoner is therefore to direct at what time before they are sworn this shall be done. He is called upon then to make his challenges, and when he has had a fair opportunity to do this, he has had the privilege the statute confers upon him.

He has a right to plead, to examine witnesses, to be heard by counsel; but the court directs the time when he shall plead, when his witnesses shall be heard, and the order in which his counsel shall speak. The prisoner may think it would be better for him that his counsel should have the closing argument, particularly in cases where he assumes the burden of proof, as in cases of insanity; and we see not why he may not as well claim to exercise his rights in his own time in that case as in this. The order of time and manner of proceeding on all such subjects, must of course be under the direction of the court, unless the statute prescribes otherwise. To make the statute what it is claimed it should read, the accused may challenge peremptorily twenty

jurors returned and impanelled at any time before they are sworn.

But it is said that by the English practice the party has a right to challenge until the juror is sworn. There each juror is sworn as soon as he has been examined and opportunity given for challenges. By our practice the jurors are none of them sworn until all have been examined and opportunity offered for challenge. Here, when one has been examined and opportunity to challenge given, he is directed to take his seat as a juror, just as in England after he has been sworn; and the delay in swearing him is not to give any privilege to the prisoner which he could not claim elsewhere, but to prevent multiplying oaths and to save the delay incident to the administration of the oath twelve times instead of once. The prisoner now claims, as matter of right to himself, a privilege which he could have no pretense to claim after the person challenged had been declared a juror by the English practice; and if the principle claimed here by the prisoner is correct, that he must be allowed this privilege to the last moment before the trial commences, the practice is wrong then, which deprives him of this privilege by swearing each juror before he has had full opportunity to make his challenge.

The effect of the practice in both cases is the same. In the one case his opportunity is closed when the juror is sworn; in the other case when he is directed to take his seat.

Our practice gives one advantage to the prisoner, that if anything new has occurred since the juror was directed to take his seat as juror, the party will not be absolutely precluded from taking the benefit of it, as he is in England after he is sworn, unless by consent. Tyndal's Case, Cro. Car. 291-2. And for that reason the court (when a motion was made to challenge the juror soon after the notice given) inquired of the counsel whether anything had occurred since the notice given by the court which called for the exercise of this right, to which it was answered there had not; by which it appears that the sole question is whether the court or the prisoner shall direct as to the time of challenge before the jury are sworn. For if the prisoner had this right, it must be conceded that the reason which prompts him to the exercise of it is not to be inquired into.

If, on the other hand, he has not the right, then it is apparent that the court, out of humanity to the prisoner, were disposed to listen to any reason which called for a dispensation of the rule

they had established, as they were not precluded entirely by administering the oath, as would have been the case in England. As no such cause existed, they saw no reason to rescind the rule they had made, conformable to our practice, of which they had given notice merely that the party should not claim to be surprised thereby.

It being a case in which life was concerned, the court were willing to find cause to relieve against the operation of a good rule, if it was like to prejudice the party; but they did not intend thereby to weaken its effect by yielding it upon a claim of right. And no case has been brought in support of this claim, except one from Ohio. Hooker v. State of Ohio, 4 Ohio R. 348. Upon looking at that case, we find that the court below had decided that they would allow no challenge for cause until the prisoner had made all his peremptory challenges. This judgment was very properly reversed by the Superior Court, conformably to our constant practice as well as to well settled principles.

In giving their reasons, the court remark that this right of peremptory challenge should be kept open to the latest possible period, to-wit, up to the actual swearing of the jury; in other words, that in this respect they follow the English practice, which we have shown is substantially followed here.

HUNTER v. PARSONS.

22 Michigan, 95. [*1870.*]

CAMPBELL, Ch. J. Parsons sued Hunter upon a promissory note, the genuineness of which was disputed, it being claimed either that an original and imperfect instrument had been altered, or that a false one entirely had been substituted.

Upon the opening of the trial, plaintiff below examined all the panel on their *voir dire,* and then for the first time challenged one of them peremptorily. It was claimed he should have challenged him after his preliminary examination and before he proceeded to question the rest. We see no error in this. There is no rule of practice forbidding the exercise of the right of peremptory challenge at any time before the jury is sworn. And

unless a party has ascertained what jurors can be excluded for cause, and therefore need not be challenged peremptorily, he may lose the chief value of this privilege. 4 Bl. Com., 353; People v. Bodine, 1 Denio, 281.

STATE v. HAYS.

23 Missouri, 287. [*1856.*]

RYLAND, J. * * *

The first point of the defendant's counsel is in regard to the impaneling of the petit jury who tried the case. The bill of exceptions shows that when the cause was taken up for trial, the defendant moved the court to compel the State, by her circuit attorney, to make her peremptory challenges to the panel before the defendant should be compelled to make his peremptory challenges, which the court refused to do, and compelled the defendant to strike from the panel his peremptory challenges, without knowing which of the panel the State would strike off, upon her peremptory challenges, making both parties challenge at the same time, to which opinion the defendant excepted. The record does not show us how this was done. There might have been thirty-six jurors present, free from all objection. Then the State having four peremptory challenges, and the defendant twenty, the remaining twelve would be the jury. If so, the defendant has not been deprived of any advantage or legal right. He has challenged his twenty, but he says he may have challenged some of those who had been challenged by the State, and had he known whom the State would have challenged, it would have given him the power to have challenged others. All this may be so, and still he has lost no right or privilege. He has the thirty-six men from whom his jury were to be selected. The State could refuse four and he twenty. No one of the jurors was put on his panel against his right, nor in violation of his right. Suppose the State's four and his twenty were confined, as it is possible they might be, to the same twenty men, leaving sixteen behind, why then the State has just as much right to complain of having lost her four challenges, because she did not know those whom he would challenge,

as he has. The first twelve then called will make the jury, and the fact that there are sixteen of which to make a jury, instead of twelve, can surely be no deprivation of any right or privilege. We do not think this such an error as would justify the court in reversing. The prisoner does not appear to have been deprived of any legal right. In what order the parties shall exercise this right is a matter within the discretion of the Circuit Court. The simplest rule upon this subject, and one to which there would seem to be no objection, is that of requiring the parties to challenge as the jurors are called and pronounced qualified, the plaintiff always speaking first. This rule, I believe, has been generally practiced; at least as far as my experience upon the Circuit Court extends, I never knew it deviated from, and that experience embraces a period of eighteen years. But as the rule adopted in this case deprives the prisoner of no legal right, and it does not appear that the discretion was exercised oppressively, it forms no ground for a reversal. The right of peremptory challenge is a right to reject, and not to select a juror. In the case of the United States v. Marchant et al. (4 Mason, 160), Justice STORY said: "The right to challenge for cause is unlimited, but the right of peremptory challenges, without cause, is limited. What is the right of peremptory challenge but a right to exclude from the trial any persons who are disagreeable to the party on trial? Suppose the panel to consist of seventy-two persons and the challenges to be limited to twenty, all that the prisoner can do is to exclude twenty from this list, and it depends altogether upon the order in which the jurors are called who may be excluded or not. If the prisoner challenge the first twenty who are called, the twelve next called from the remaining fifty-two constitute the jury. It is true, if he chooses to suffer any person to be sworn before he has exhausted his challenges, to that extent he selects his jury; but this is a new incident to his right to exclude jurors to a limited extent, and not the principal object contemplated by the law." Mr. Justice BLACKSTONE, in his Commentaries (4 Black. Com. 353), with his usual perspicacity and accuracy, states the reasons on which the right of peremptory challenge is founded. He says: "In criminal cases, or at least in capital ones, there is, in *favorem vitae*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all, which is called a peremptory challenge, a provision full of that

tenderness and humanity to prisoners for which our English laws are justly famous. This is grounded on two reasons: 1. As every one must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner, when put to defend his life, shall have a good opinion of his jury, the want of which might totally disconcert him, the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for his dislike. 2. Because, upon challenge for cause, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside." Being satisfied, from authority as well as from the reason of the case, that the right of peremptory challenge was given to exclude rather than to select, and the prisoner having exercised that right in this case, we can not see how he has been injured or deprived of his legal rights in the mode adopted in this case for impaneling the jury. We conclude, therefore, that, although the rule, heretofore so long practiced, of requiring the parties to challenge as the juror is called up to be sworn, after having been qualified to serve and so pronounced by the court, the State always to speak first, is the best and least objectionable mode, yet a deviation therefrom, without showing that in consequence thereof the prisoner has been injured, will not authorize a reversal. The point, therefore, is ruled against the prisoner.[1]

COLLISON v. I. C. R. R. CO.

239 Illinois, 532. [*1909.*]

CARTWRIGHT, C. J. * * * The first thing which occurred on the trial which is claimed to be an error is that the court, in em-

[1] In civil cases the practice in Missouri is now regulated by the following statute:

Sec. 7281, R. S. 1909: "In trials of civil causes each party shall be entitled to challenge, peremptorily, three jurors; but when there are several plaintiffs and defendants they shall join in their challenges, and the plaintiff shall, in all cases, announce his challenges first."

paneling the jury, compelled the defendant to examine and pass upon the second panel of four jurors before the same were examined and accepted by the plaintiff. The statute [1] provides that the jury shall be passed upon and accepted in panels of four by the parties, commencing with the plaintiff, which means that the plaintiff shall pass upon the jurors until four have been accepted and tendered to the defendant, when the defendant is to pass upon the jurors until a panel of four is accepted and tendered back. When one panel of four is complete the plaintiff is to pass upon and accept the next panel of four and tender the same to defendant, and so on. The plaintiff is not called upon to tender a second panel of four to the defendant before the defendant has tendered back the first panel of four (Spies v. People, 122 Ill. 1), but when four are taken by both sides the plaintiff must go ahead with the next panel. The ruling was wrong, but the rights of the defendant do not appear to have been prejudiced in any way by it and therefore it is not ground for a reversal.

SECTION 2. INTRODUCTION OF EVIDENCE.

(a) *Preliminary Questions.*

STOWE v. QUERNER.

L. R. 5 Exchequer, 155. [*1870.*]

BRAMWELL, B. In this case the question which was argued before us yesterday arose thus: During the trial of an action on a policy of insurance it became necessary to produce the

[1] Sec. 21, Ch. 78, R. S. Ill. 1913. Upon the impaneling of any jury in any civil cause now pending, or to be hereafter commenced in any Court in this State, it shall be the duty of the Court, upon request of either party to the suit, or upon its own motion, to order its full number of twelve jurors into the jury box, before either party shall be required to examine any of the said jurors touching their qualifications to try any such causes; Provided, that the jury shall be passed upon and accepted in panels of four by the parties, commencing with the plaintiff.

Sec. 69, Ch. 110 Ib. In all civil actions each party shall be entitled to a challenge of five (5) jurors without showing cause for such challenge.

policy, and the plaintiffs gave evidence of a duly stamped policy having been executed, and of its being in the possession of the defendant. Notice to produce had also been given. Upon its being called for, however, the defendant declined to produce it, and thereupon the plaintiffs proposed to read a document which purported to be a copy, and which they had received from the defendant's broker. The defendant objected, and offered to displace the effect of the evidence of the existence of the policy which had been given by the plaintiffs, and to render the copy inadmissable by showing that no policy had ever been executed at all. The judge refused to hear this interlocutory evidence, and allowed the document to be admitted and read. We are all of opinion that he was right. If the objection on the part of the defendant had been that there was a policy, but that it was not stamped, it would perhaps have been well founded. But here it was objected that there was no policy executed at all; an objection which goes to the entire ground of action, and one which, if it had prevailed, might have left the jury nothing to decide. For, suppose the judge had ruled that the copy was inadmissible on the ground that there was no original ever in existence, the plaintiffs would in fact have had no case left, and the judge would himself have decided the whole of it. The difference between this case and Boyle v. Wiseman, 10 Ex. 647, is very wide. There the plaintiff had the means, if he had chosen, of giving the alleged original in evidence, but here if the copy had been excluded the plaintiffs would have been left without any means of proof whatever. Put an illustration analagous to the present. Suppose an action to be brought for libel, and a copy of a letter which is destroyed, but which contained the libel complained of, is produced and tendered in evidence. Could the defendant say, "Stop; I will show that no letter was in point of fact ever written, and I call upon you, the judge, to hear evidence upon this point, and if I satisfy you that no such letter ever existed, you ought not to admit the copy?" Surely not; for that would be getting the judge to decide what is peculiarly within the province of the jury. The distinction is really this: where the objection to the reading of a copy concedes that there was primary evidence of some sort in existence, but defective in some collateral matter, as, for instance, where the objection is a pure stamp objection, the judge must, before he admits the copy, hear and determine

whether the objection is well founded. But where the objection goes to show that the very substratum and foundation of the cause of action is wanting, the judge must not decide upon the matter, but receive the copy, and leave the main question to the jury.

It was further said there was no stamped policy in existence. But the real objection, as I have already observed, was that there was no policy at all, and therefore, of course, no stamped policy. The want of stamp was not the actual point relied on, and it was in a manner merged in the other objection. We are, therefore, of opinion that this rule should be discharged.[1]

GLASSELL v. MASON.

32 Alabama, 719. [*1858.*]

Action by the assignee of a promissory note alleged to have been lost or destroyed, in which the plaintiff gave evidence tending to show the execution, contents, assignment and loss of the instrument. The court refused an instruction to the effect that the plaintiff was bound to satisfy the jury that the note was destroyed. Verdict for plaintiff, and defendant took the case up on writ of error.[1]

STONE, J. * * * The rule which requires preliminary proof of the destruction or loss of a written contract, before evidence of its contents can be received, is a rule affecting the grade of the evidence—not the measure of proof. It is a rule of law founded in good policy; a failure to comply with which does not simply leave the party's evidence insufficient. It goes farther, and pronounces it wholly illegal. It is not one of the questions of fact within the issue before the jury. It is an outside inquiry, preliminary to the introduction of any evidence to the jury as to the contents. If this were not the case, a plaintiff who proved a just demand against the defendant, and the amount of it, must yet lose his case, if he failed to convince the jury that the written evidence of his contract was lost or destroyed. Suppose,

[1] Accord. Grady v. Ins. Co., 60 Mo. 116; Powell v. Adams, 9 Mo. 766; Bk. v. Myers, 6 S. & R. 11; Siegfried v. Levan, 6 S. & R. 307.

[1] Statement has been condensed.

in such case, the jury should return a special verdict; and, in addition to finding the issue joined in favor of the plaintiff, should, of their own motion, further find that the note or bond was not lost. What judgment would be rendered on such verdict? Evidently for the plaintiff, because the verdict, to the above extent, would not be responsive to the issue. The jury would be pronouncing on the legality, not the sufficiency of the evidence. This preliminary proof is always addressed to the court, and may be made by the party himself, when the facts are within his knowledge. See 1 Greenlf. Ev. § 349, and note § 558; Thomas v. DeGraffenreid, 17 Ala. 602; also authorities cited in Brister v. The State, 26 Ala. 107.[2] The paper called an assignment was properly admitted in evidence.

DOE *Dem.* JENKINS v. DAVIES.

10 Adolphus & Ellis (N. S.), 314. [*1847.*]

LORD DENMAN, C. J. It was admitted that the defendants were entitled to the verdict, if one Elizabeth Stevens was legitimate; that is, if her mother was the wife of her father, John Davies.

The plaintiff began, and brought forward facts to make this improbable, particularly the declarations of John Davies, who was reported to have said that he had not married her, because she was a bad woman. It appeared, however, that they lived together and passed as man and wife. Some members of the family had treated her as his wife; others had treated her daughter, Elizabeth Stevens, as their relation.

Witnesses were then called for the defendants, who gave additional evidence to the same effect; and then an attorney produced a certificate of the marriage of John Davis with Eleanor Dillon, and stated that he had received it from Elizabeth Stevens when he was inquiring into the pedigree. He was then asked whether

[2] See also Jackson v. Frier, 16 Johnson, 193; Smith v. Sleap, 1 Car. & K. 48. When a copy of a lost instrument has been introduced, the accuracy of the copy is a question for the jury. Rosendorf v. Baker, 8 Or. 241.

Stevens made any statement respecting her mother's marriage; and the question was objected to on various grounds.

First: That she was not yet conclusively proved to be a member of the family. The answer is, that it was the duty of the judge to decide whether it was proved to him, and he decided that it was. There are conditions precedent which are required to be fulfilled before evidence is admissible for the jury. Thus an oath, or its equivalent, and competency, are conditions precedent to admitting *viva voce* evidence; and apprehension of immediate death to admitting evidence of dying declarations; and search to secondary evidence of lost writings; and stamp to certain written instruments; and so is consanguinity or affinity in the declarant to declarations of deceased relatives. The judge alone has to decide whether the condition has been fulfilled. If the proof is by witnesses, he must decide on their credibility. If counter evidence is offered, he must receive it before he decides, and he has no right to ask the opinion of the jury on the fact as a condition precedent. See Bartlett v. Smith (11 M. & W. 483). In this case the judge thought the condition had been fulfilled, and we are of the same opinion.

It is further objected that the question whether Elizabeth Stevens was a member of the family was in fact the issue for the jury, as she was not contended to be so unless she was legitimate; and, if she was decided to be legitimate, her declarations to prove her legitimacy were superfluous. The answer is, that neither the admissibility nor the effect of the evidence is altered by the accident that the fact which is for the judge as a condition precedent is the same fact which is for the jury in the issue.[1]

WINSLOW v. BAILEY.

16 Maine, 319. [*1839.*]

EMERY, J. The suit is on a note of the 28th of May, 1835, given in payment for a bond assigned by the plaintiff to the defendant.

[1] See also, Hitchins v. Eardly, L. R., 2 P. & D. 248, where the same situation was presented.

The defendant resisted payment because, he alleged, that the note was obtained by false representations of the quantity of timber on lands reserved for public use in the town of Chester, in the county of Penobscot, containing 1,000 acres more or less, for which the bond was given to Winslow. There was a certificate of Jeremiah Jameson, dated May 14, 1835, that he had explored the tract, and that it contained 10,000 feet of the best quality of pine timber to the acre in his opinion.

It was also proved that the plaintiff, between the 10th and 20th of May, 1835, had been on to the land, and that there was very little timber on the tract. And it was proved that this paper was in the plaintiff's possession at and about the time it was made, and that he used it to induce others to purchase the land, and was in his possession a short time before the sale of the bond, and a few days after in the hands of one of the defendants. After these facts and circumstances were proved the defendants offered the Jameson certificate, which they alleged was false.

To the admission of this paper in evidence, to show that it was used by the plaintiff in the sale of the bond to induce the defendants to purchase, the plaintiff objected until proof was introduced to show that it was so used. And it is insisted that the proof of this fact should have been addressed to the court, that it was a fact to be decided by the court, and exclusively within their province. We conceive, with the plaintiff's counsel, that the authorities cited by him do establish that it is the exclusive right of the court to decide on the legality and competency of all testimony which is to be read or given to the jury.

That the certificate was made by Jameson was not contested. That the plaintiff had it in his possession at and about the time it was made being proved, as well as the fact that the plaintiff had it in his possession a short time before the sale, and had used it to induce others to purchase the bond, would not alone be evidence that it was used to induce the defendants to purchase. It was, therefore, necessary to exhibit some other proof, by which the court should be persuaded to the conviction that it ought to go to the jury as tending to maintain the ground of defense. That proof was given of the subsequent possession of this very paper by one of the defendants. We think this well justified the court in permitting it to be read. The subsequent remarks of the court were full of good sense, and were of the most favorable character towards the plaintiff's case; that if the jury were

not satisfied that it had been used to induce the defendants, it would not be evidence in the case. Though fraud is not to be presumed, it is usually proved by circumstances. It is most natural to suppose from the circumstances that the plaintiff obtained the certificate on the 14th of May, 1835, of the quantity of pine timber of the best quality to the acre on the tract, and had used it before the sale to induce others to purchase, that it was a principal consideration of himself and others, with whom he should deal, to take the land thus loaded with a most valuable commodity. This may properly be presumed. It is not pretended that there were any gold or silver mines on it, or slate or granite quarries to work upon the imagination of purchasers. The defendants, having in their possession this paper, did come before the jury with strong moral evidence that they received it from the plaintiff in a rightful manner. He never complained that it had been wrongfully withdrawn. It was most natural to suppose it would be delivered over by him to the purchasers, with the design that it should be accredited. But if it was not so done, he had the liberty to call upon Wilson, the witness, or introduce any testimony to render it doubtful to the jury whether it had been so employed.

SEMPLE v. CALLERY.

184 Pennsylvania St. 95. [*1898.*]

Mr. Justice FELL. The court, at the time a witness was called, heard testimony on the question of the good faith of an assignment by which the witness had divested himself of all interest in the controversy, and permitted him to testify. At the close of the testimony the court was requested to submit to the jury the same question on which it had passed, and to instruct them to disregard the testimony of the witness if they found that the assignment had not been made in good faith. The sixth section of the Act of May 23, 1887, P. L. 158, provides that a person incompetent to testify as a witness because of interest may become fully competent "by a release or extinguishment, in good faith, of his interest, upon which good faith the trial judge shall pass as a preliminary question." It was not intended by this provi-

sion to make the decision of the court subject to review by the jury, and to change the long established rule of evidence that it is the province of the court finally to decide preliminary questions of fact upon which the admissibility of testimony depends. Whether a release has been executed in good faith is a question preliminary to the question of competency, and as such it is decided as a preliminary question, but its decision is not preliminary merely to a second decision by the jury. The competency of a witness, as to questions of both fact and law is to be determined by the court.[1]

WILSON v. UNITED STATES.

162 U. S. 613. [*1895.*]

Mr. Chief Justice FULLER, after stating the case, delivered the opinion of the court. * * *

In the case at bar defendant was not put under oath, and made no objection to answering the questions propounded. The commissioner testified that the statement was made freely and voluntarily, and no evidence to the contrary was adduced. Nor did defendant, when testifying on his own behalf, testify to the contrary. He testified merely that the commissioner examined him "without giving him the benefit of counsel or warning him of his right of being represented by counsel, or in any way informing him of his right to be thus represented." He did not testify that he did not know that he had a right to refuse to answer the questions, or that, if he had known it, he would not have answered. His answers were explanations, and he appeared not to be unwilling to avail himself of that mode of averting suspicion. It is true that, while he was not sworn, he made the statement before a commissioner who was investigating a charge against him, as he was informed; he was in custody but not in irons; there had been threats of mobbing him in the night before the examination; he did not have the aid of counsel; and he

[1] And so on the question of Agency or Conspiracy, where declarations of the alleged agent or co-conspirator are sought to be imputed to a party as admissions. Jones v. Hurlburt, 39 Barbour (N. Y.) 403; but see Swearingen v. Leach, 7 B. Monroe, 285.

was not warned that the statement might be used against him or advised that he need not answer. These were matters which went to the weight or credibility of what he said of an incriminating character, but as he was not confessing guilt but the contrary, we think that, under all the circumstances disclosed, they were not of themselves sufficient to require his answers to be excluded on the ground of being involuntary as matter of law.

When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant.[1] Commonwealth v. Preece, 140 Mass. 276; People v. Howes, 81 Mich. 396; Thomas v. State, 84 Georgia, 613; Hardy v. United States, 3 Dist. Col. App. 35. The question here, however, is simply upon the admissibility of the statement, and we are not prepared to hold that there was error in its admission in view of its nature and the evidence of its voluntary character; the absence of any threat, compulsion or inducement; or assertion or indication of fear; or even of such influence as the administration of an oath has been supposed to exert.

Judgment affirmed.

BURTON v. STATE.

107 Alabama, 108. [*1894.*]

On the trial of an indictment for murder, where the defendant's confession had been admitted, the court gave the following charge: (28) "Where confessions by the defendant are ad-

[1] Morton, C. J., in Commonwealth v. Preece, 140 Mass. 276 * * * Where a confession is offered in evidence, the question whether it is voluntary is to be decided primarily by the presiding justice. If he is satisfied that it is voluntary, it is admissible; otherwise it should be excluded. Where there is conflicting testimony, the humane practice in this Commonwealth is for the judge, if he decides that it is admissible, to instruct the jury that they may consider all the evidence, and that they should exclude the confession, if upon the whole evidence in the case, they are satisfied that it was not the voluntary act of the defendant.

mitted in evidence by the court, if the jury believe the confessions are true, they can not disregard them, although they may believe that they were not voluntarily made." The court refused the following instructions requested by the defendant: (67) "The court charges the jury that they are the final judges as to whether the confession as testified to by Lawrence P. Evans, the State's witness, was voluntary or not." (68) "The court charges the jury that in passing on the credibility of the statement made by the defendant, as testified to by the witness for the State, they may take into consideration the circumstances under which they were made, and if the jury believe from the evidence before them that such statements were not freely, voluntarily and intelligently made, then the jury should reject them as wanting in credibility, and as not entitled to weight, in passing on the guilt or innocence of the defendant."[1]

COLEMAN, J. (after holding that the confessions were properly received). * * *

Charge 28 given at the instance of the prosecution and charges 67 and 68, refused to the defendant, will be considered in part together. These relate to the province and power of the jury as to confessions after they have been admitted by the court. It is the established law of this State, and that which prevails almost universally, that confessions of a defendant are not admissible against him, in a criminal prosecution, unless voluntarily made. Whether voluntarily made or not, we hold is a question of law to be determined by the court from the facts, as a condition precedent to their admission. Bonner v. State, 55 Ala. 242, and authorities; Young v. The State, 68 Ala. 569. Having been declared competent and admissible, they are before the jury for consideration. The jury have no authority to reject them as incompetent. But the jury are the sole judges of the truth and weight to be given confessions, as they are of any other fact. In weighing the confessions, the jury must take into consideration all the circumstances surrounding them, and under which they were made, including those under which the court declared as matter of law they were voluntary. In weighing confessions, the jury necessarily consider those facts upon which their admissibility, as having been voluntarily made, depends.

[1] The statement has been abridged.

While there is no power in the jury to reject the confessions as being incompetent, there is no power in the court to control the jury in the weight to be given to facts. The jury may, therefore, in the exercise of their authority and within their province, determine that the confessions are untrue, or not entitled to any weight, upon the grounds that they were not voluntarily made. The court passes upon the facts merely for the purpose of determining their competency and admissibility. The jury pass upon the same facts, and in connection with other facts, if there are other facts, in determining whether the confessions are true and entitled to any and how much weight. The court and jury each have a well defined and separate province. Young's Case, *supra.* It follows, that although the jury may come to the conclusion that the confessions were not voluntary, yet if from extrinsic evidence or from their character and the circumstances the jury are satisfied that they are true the jury should act upon them. Being competent and the jury being satisfied beyond a reasonable doubt of their truth, the jury may very properly convict on such evidence. There was no error in giving charge 28. The statement in the opinion of the case of Goodwin v. The State, *supra,* that it is the "duty" of the jury to discard and reject the confessions altogether if they are of opinion that the confessions were not voluntarily made, although they may believe them to be true, is herein modified in so far as it conflicts with the opinion in the present case.

Charge 67 requested by defendant is not full enough. The jury consider whether confessions were voluntary in passing upon their weight, but the jury is not authorized to determine their admissibility. The charge was calculated to mislead.

Charge 67 was properly refused, as invading the province of the jury. It required the jury to reject the confessions absolutely, if in their opinion they were not voluntarily made. It was their duty to consider them and their province to give them such weight as they saw proper.[2]

[2] "Evidence was also given of her declarations in the prisoner's absence, after she was confined to her bed, all of which tended to show the circumstances of violence he had committed upon her. It was objected, that the declarations of the wife in the absence of the prisoner ought not to have been admitted in evidence, as it was not proved that she considered herself at the time as a dying person; the evidence not being express on that head; but that if the evidence were admissible, it

STATE v. HYDE.

234 Missouri, 200. [*1910.*]

On the trial of an indictment for the murder of Col. Thomas H. Swope by poison, in order to show design and motive, the State introduced a large amount of evidence, tending, as it was claimed, to show attempts on the part of the defendant to poison other members of the Swope family. Defendant was convicted and appealed.[1]

FERRISS, J. * * *

The claim that defendant attempted to poison Sarah Swope, by handing to Stella a capsule with a request that she ask the nurse to give it to Sarah, and further claim that he inoculated them both with typhoid by giving them candy, are neither one supported by any evidence worthy of consideration. According to the expert testimony in this case, the percentage of fatalities in typhoid fever does not exceed two per cent—one in fifty. The defendant, knowing this fact as a physician, would not be likely to select typhoid fever as a direct instrument of murder. To meet this situation, the State advances the theory or suggestion

ought to have been left to the jury to consider whether the wife were at the time conscious of approaching death. Objection was also made, that these being declarations of a wife against her husband were not on that account evidence. The Court was of opinion, that the reason of the rule that a wife shall not be admitted to give evidence against her husband did not apply to this case. And upon the other point, that evidence of the state of the wife's health, at the time the declarations were made, was sufficient to show that she was actually dying; and that it was to be inferred from it, that she was conscious of her situation: and no particular direction was given to the jury on the subject. The jury having found the prisoner guilty, these points were referred to the judges; who at a conference in Easter term, 1790, all agreed that it ought not to be left to the jury to say, whether the deceased thought she was dying or not; for that must be decided by the judge before he receives the evidence. And if a dying person either declare that he knows his danger, or it is reasonably to be inferred from the wound or state of illness that he was sensible of his danger, the declarations are good evidence. But as to the declarations themselves in this case, all the judges, except two, thought that there was no foundation for supposing that the deceased considered herself in any danger at all." Rex v. John, 1 East P. C. 357.

See also State v. Brennan, 164 Mo. 487; State v. Monich, 74 N. J. L. 522.

[1] Statement has been abridged.

that "it would serve as a mask and cover for deaths that might be otherwise produced" (State's brief); in other words, afford an opportunity to poison the typhoid patient. This theory of the State concerning the germ inoculation is built upon a series of inferences upon inferences, without any substantial underlying basis of fact.

We are of opinion that none of the testimony of other alleged crimes should have been given to the jury. Having been admitted, it should have been withdrawn from their consideration. We also think that the better practice would be that the court should, as a preliminary matter, when the State proposes to offer evidence of other crimes, either hear the evidence or satisfy itself as to its character and scope by inquiry of the prosecuting attorney, and determine whether there is sufficient evidence of the other alleged crime to justify its submission to the jury. We do not mean to say that the evidence upon such preliminary hearing must prove beyond a reasonable doubt that the other crime had been committed, but that there should appear substantial evidence sufficient to take a case to a jury. A satisfactory precedent is found in the case of Commonwealth v. Robinson, 146 Mass. 571,[2] where such preliminary hearing was had. As to the degrees of proof on such hearing the court said (l. c. 581): "Where, in a case like the present, the admissibility of testimony

[2] Allen, J., in Commonwealth v. Robinson, 146 Mass. 571. * * * "But where, in a case like the present, the admissibility of the testimony depends upon the determination of some prior fact by the Court, there is no rule of law that, in order to render the testimony admissible, such prior fact must be established by a weight of evidence which will amount to a demonstration, and shut out all doubt or question of its existence. It is only necessary that there should be so much evidence as to make it proper to submit the whole evidence to the jury. The fact of the admission of the evidence by the judge does not in a legal sense give it any greater weight with the jury; it does not affect the burden of proof, or change the duty of the jury in weighing the whole evidence. They must still be satisfied, in a criminal case, upon the whole evidence, beyond a reasonable doubt. Ordinarily, questions of fact are exclusively for the jury, and questions of law for the Court. But when, in order to pass upon the admissibility of evidence, the determination of a preliminary question of fact is necessary, the Court in the due and orderly course of the trial must necessarily determine it, as far as it is necessary for that purpose, and usually without the assistance, at that stage, of the jury. If, under such circumstances, testimony is admitted against a party's objection, it may often happen that he may still ask the jury to disregard it."

depends upon the determination of some prior fact by the court, there is no rule of law that, in order to render the testimony admissible, such prior fact must be established by a weight of evidence which will amount to a demonstration, and shut out all doubt or question of its existence. It is only necessary that there should be so much evidence as to make it proper to submit the whole evidence to the jury."

In a case like this, involving a large amount of testimony concerning other crimes which would occupy days in presentation, it would be impracticable to give a preliminary hearing to all the details. In such case the court may properly be guided by the offer of proof and by such testimony as can be conveniently presented; enough to satisfy the court that the evidence is relevant and of sufficient weight to authorize its submission to the jury. The great danger that evidence of other crimes, even if it fails to establish them, and even if it is by an instruction withdrawn from the jury, will prejudice the jury against the defendant and obscure their judgment upon the real issues before them, suggests the propriety of determining in advance of its introduction that such testimony is competent.

(b) *Offers and Objections.*

CHICAGO RY. CO. v. CARROLL.

206 Illinois, 318. [*1903.*]

Mr. Justice RICKS. * * *

When this witness retired from the stand, appellee announced that he rested his case. Appellant's attorney then said: "We desire to offer evidence, your honor, on the question of inspection of the cars, and so forth." The court replied: "Very well; I won't receive any evidence except as to the ownership of this line at this stage." Exception was taken, and it is now urged that, inasmuch as appellee was allowed to show the inscription on the cars, it tended to show ownership, and that appellant should have been allowed to show that it did inspect its cars; that in the absence of proof of ownership appellant was not required to prove anything, and that as there was no evidence, until the

testimony of this son, of ownership, the court should have opened the case and allowed proof upon the question of inspection. It may first be said, there was evidence of ownership and operation of the car by appellant already in the record, and it would be a dangerous rule of practice to sustain error upon an assignment such as this. Appellant, in fact, offered no evidence upon the matter. No witness was put upon the stand; no question was asked. Nothing was done except a mere conversation or talk had between counsel for appellant and the court. Such procedure as that does not amount to an offer of evidence, and the remarks of the court did not amount to a refusal to admit evidence. There can be no refusal to admit that which has not been offered, and counsel cannot, by engaging in a mere conversation with the court, although it may relate to the procedure, by merely stating what he desires to do, get a ruling from the court upon which he can predicate error. If appellant desired to make the contention it now makes, it should have at least put a witness upon the stand and proceeded far enough that the question relative to the point it is now said it was desired to offer evidence upon was reached, and then put the question and allow the court to rule upon it, and then offer what was expected to be proved by the witness, if he was not allowed to answer the question asked. It was not stated to the court that appellant did inspect the cars or could prove that the cars had been regularly inspected or recently inspected, or that the inspection that was made was an examination of the trolley-pole or its attachments, and to now hold that the case should be reversed upon the mere statement of counsel that he desired to offer evidence upon the question of the "inspection of the cars, and so forth," would, as we think, be setting a dangerous precedent, and one that would tend to irregularity in such matters. Stevens v. Newman, 68 Ill. App. 549; Beard v. Lofton, 102 Ind. 408; Morris v. Morris, 119 id. 341; Ralston v. Moore, 105 id. 243; Smith v. Gorham, 119 id. 436; City of Evansville v. Thacker, 2 Ind. App. 370; Darnell v. Sallee, 7 id. 581; First Nat. Bank v. Stanley, 4 id. 213; Lewis v. State, id. 504; Huggins v. Hughes, 11 id. 465; 8 Ency. of Pl. & Pr. 236.

GRIFFIN v. HENDERSON.

117 Georgia, 382. [*1903.*]

LAMAR, J. The caveatrix, among other grounds, objected to the probate of her mother's will, for the reason that the testatrix had made the will under a mistake of fact as to the conduct of the daughter, who was her sole heir at law. Civil Code, § 3262. No demurrer or exception was filed to this ground of the caveat. One of the grounds of alleged error was that the court refused to permit the caveatrix to testify as a witness to any communications made to her by her mother, or conversations between them. "The court so ruling, no questions were propounded to the witness (caveatrix), who would have testified that Mrs. A. C. Brown treated her entirely different after her marriage to her husband, Mr. C. M. Griffin, than she had done prior to the marriage," and to other facts which relate to the question of a mistake of fact. * * * It is expressly stated that no questions were propounded to the witness; and while the motion says what she would have testified, it does not appear that the court was informed thereof at the time he excluded her; and therefore we are not permitted to consider this assignment of error. No matter how competent a witness might be, a court will not grant a new trial merely because he was not allowed to testify. It must appear that the excluded testimony was material; and the almost universal rule of practice is that what that material testimony was must be expressly called to the attention of the trial court at the time of its exclusion. Bigby v. Warnock, 115 Ga. 386; Southern Mutual Ins. Co. v. Hudson, 113 Ga. 438; Freeman v. Mencken, 115 Ga. 1018. In a few instances there may be an exception—as in cross-examinations, where the examining counsel may not know what the answer will be, or is exercising a right to test the witness; but ordinarily the exclusion of oral testimony can be made available as error only by asking some pertinent question, and, if an objection is sustained, informing the court at the time what the answer will be, so that he can then determine whether the fact is or is not material. It will not do to state thereafter what the witness would have answered. The error, if any, must have been committed on the trial; and the ruling must have been made, not on a question only, but in the light of the facts about which the witness would have testified.

Where a question is asked, the answer excluded, and no statement made to the judge as to what the witness would have sworn, there is nothing before the court. It is impossible for the judge on the motion for a new trial, or for this court, on a bill of exceptions, to say whether the complaining party would have been benefited or injured by the answer. The witness may not have known anything of the subject inquired about; and if a new trial should be granted because the answer was excluded, it might happen that on the second trial the question would be again propounded, allowed, and the witness give hearsay, inadmissible, or irrelevant testimony, or the answer might be harmful instead of helpful, or the witness might reply, "I do not know," with the result that the time and money of the parties and the country has been wasted for so inconsequent a conclusion. That this is not unlikely to occur is shown by the experience of all practicing lawyers, who have often seen a long heated argument as to the right to ask a question followed by the laughter of all bystanders when the court held it competent, and the witness replied that he knew nothing about the matter. Parties can often agree in the presence of the court as to what the witness would testify, or, if not, the witness, or examining attorney, can state what the answer would be; and where the subject-matter is important, the judge may, in his discretion, retire the jury until its admissibility has been settled. We are well aware that the rule may be perverted into a means of getting inadmissible evidence before the jury, or by forcing their constant withdrawal, retarding the trial. The courts must rely upon the good faith of counsel not to bring about such a result. But it would never do to grant a new trial until it appeared, not only that the question was proper but that the answer was material and would have been of benefit to the complaining party. Where a witness is not allowed to answer a question, he is, as to that particular matter, as though he were absent; and the rule requiring a showing as to what an absent witness would testify, and the materiality of his testimony, stands on the same principle as a showing required in rulings when the court will not admit evidence. See Civil Code, § 5129; Thompson v. State, 55 Ga. 47. While the rule as to assigning error on the exclusion of testimony is not without its exceptions, the practice in other jurisdictions is substantially that in this state. Railroad v. Stonecipher, 95 Tenn. 311; Omaha

Ins. Co. v. Berg, 44 Neb. 522 (3); and see many cases cited in 2 Cyc. L. & P. 697.[1]

WILLIAMS v. WILCOX.

8 Adolphus & Ellis, 314. [*1838.*]

On a rule *nisi* for a new trial.

LORD DENMAN, C. J. * * *

A single point, however, still remains to be mentioned, on which the defendants claim a new trial. In order to establish the antiquity of the weir, the plaintiff tendered in evidence what purported to be a copy of an ancient grant found in a chartulary of Haghmon Abbey; the single objection now relied on against its reception is, that no search was proved to have been made for the original. The note of the learned judge is very specific as to the objection made at the trial, and his memory clear as to what then occurred; but he has no minute or recollection of this point having been pressed; and it is an objection so much upon the surface, that, if brought clearly to his notice, it is scarcely conceivable but that it must have prevailed; indeed we think that it must have been acquiesced in by the counsel on the other side. We do not doubt that it was in fact made; but, as the whole class of that evidence, of which this document formed a single item, was also objected to, and the attention of the learned judge was naturally directed to that more general and important objection, it is probable that this was not so made as to attract his notice. In all cases, and especially in one so circumstanced as this, it is the business of the counsel to take care that the judge's attention is drawn to any objection on which he intends afterward to rely. Justice requires this, not so much to the judge, as to the opposite party, who may be willing, as in the present case would probably have been done, rather to waive the benefit of the evidence than put his verdict in peril on the issue of the objection. If, by inadvertence, this was not done at the trial, we think we ought not, either upon general principles or with a view to the

[1] And so in Jackson v. Hardin, 83 Mo. 175.

particular circumstances of this case, to allow the objection now to prevail. The admitted document was but one of many to prove what in the end was unquestionable and unquestioned, the very great antiquity of the weir; its admission, therefore, occasioned no injustice; its rejection could not and ought not to have varied the verdict.

The rule, therefore, on all points will be discharged.

LEVIN v. RUSSELL.

42 New York, 251. [*1870.*]

GROVER, J. * * *

The omission of the plaintiff to file a statement of his interest in the property, the mortgage, as required by statute, to preserve his lien against the creditors of the mortgagor, was obviated by the proof showing that the plaintiff took possession of the property by virtue of his mortgage in the lifetime of the intestate and before any lien of any creditor had attached and that he retained such possession until the property was taken from him by the defendant. The testimony of the plaintiff as to the transaction between him and the intestate was not competent evidence against the defendant, and had such testimony been properly objected and excepted to, its admission would have been erroneous; but there was no ground assigned for the objection. It is the well settled law that objections to testimony without assigning any ground therefor will be disregarded unless it clearly appears that the objection, if properly made, would have been decisive of the case, and could not have been obviated. It does not so appear in the present case. After the plaintiff had been examined and cross-examined by the appellant in regard to such transactions, the counsel for the appellant moved to strike out the testimony. This motion was denied by the referee, to which an exception was taken. It is entirely clear that a party who has sat by during the reception of incompetent evidence without properly objecting thereto, and thus taken his chance of advantage to be derived by him therefrom, has not, when he finds such evidence prejudicial to him, a legal right to require the same to be stricken out. The denial of the motion was not, therefore, any ground of excep-

tion.[1] I have examined the other exceptions to the rulings of the referee upon the competency of evidence and think none of them well taken. The judgment appealed from must be affirmed with costs.

NOONAN v. CALEDONIA MINING CO.

121 U. S. 393. [*1886.*]

Mr. Justice FIELD. • • •

The objection to the introduction of the articles of incorporation at the trial was that they were "immaterial, irrelevant, and incompetent" evidence. The specific objection now urged, that they were not sufficiently authenticated to be admitted in evidence, and that the certificates were made by deputy officers, is one which the general objection does not include. Had it been taken at the trial and deemed tenable, it might have been obviated by other proof of the corporate existence of the plaintiff or by new certificates to the articles of incorporation. The rule is universal, that where an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal, unless it be of such a character that it could not have been obviated at the trial. The authorities on this point are all one way. Objections to the admission of evidence must be of such a specific character as to indicate distinctly the grounds upon which the party relies, so as to give the other side full opportunity to obviate them at the time, if under any circumstances that can be done. United States v. McMasters, 4 Wall. 680; Burton v. Driggs, 20 Wall. 125; Wood v. Weimar, 104 U. S. 786, 795.[1]

[1] The motion to strike out is to be used where an improper answer is given to a proper question. State v. Sykes, 191 Mo. 62.

[1] It has been held that a general objection is sufficient to preserve the question where the evidence is wholly inadmissible and the objection could not have been obviated. Bailey v. Kansas City, 189 Mo. 503.

ESCHBACH v. HURTT.

47 Maryland, 61. [*1877.*]

MILLER, J. This is an action for malicious prosecution, brought by the appellee against the appellant. * * *

The question which the defendant's counsel insist that this exception presents, and which they have argued with great ability is, whether under the declaration in this case, and the issue joined on the plea of not guilty, evidence of the bad reputation of the plaintiff for honesty and integrity is admissible, either as tending to show probable cause, or in mitigation of damages. The exact question thus discussed has never been expressly adjudicated in this State, and it must be conceded that elsewhere there is much conflict of authority upon the subject. But we do not propose to review the numerous cases that have been cited in argument, nor to express any opinion as to the admissibility of such evidence, because in our judgment that question is not presented by the ruling of the Superior Court, to which the defendant excepted. We may observe, however, that the present state of the English adjudications on this subject is thus laid down in Addison on Torts (4th Eng. Ed.), 767: "When the plaintiff in his declaration avers that up to the time of the prosecution by the defendant, he had borne a good character, and claims damages for injury to his character, it may be shown on cross-examination of the plaintiff's witnesses that he was at the time a man of notoriously bad character. But where the plaintiff does not in his declaration claim damages in respect of injury to reputation, general evidence of the plaintiff's character is inadmissible. Such general evidence affords no proof of probable cause for a prosecution."

But as we have said the question is not raised by the exception, and this we shall proceed to show. The record states that the plaintiff, to sustain the issue joined on his part, offered testimony tending to prove that he carried on the business of selling wood and coal by taking orders at No. 2 North Street, in Baltimore City, but owned no wood and coal of his own, and that he had been engaged in the business for some ten years; he then offered testimony tending to prove the allegations of the declaration but offered no testimony as to his general reputation. After the plaintiff had closed, the defendant offered to

produce testimony tending to prove that the plaintiff's reputation for credit was bad, and that his reputation for honesty was bad before the said charge was made against him by the defendant, and for this purpose called James Diggs as a witness, and put to him this question, "Do you know the standing of George W. Hurtt for credit and honesty among the men and parties in the same business with him in this community?" To this question the plaintiff's counsel objected and the court sustained the objection. The judge then proceeded to give his reasons for this ruling sustaining the objection to this question, and said the "gravamen of the action was the false imprisonment of the plaintiff with malice and without probable cause, and that the averment in the narr. with reference to his good repute, was matter of inducement and not traversable; the question of character therefore was not in issue, and the evidence proposed to be given was inadmissible." The defendant then (as the exception states) through his counsel excepted to the court's ruling, and the exception was duly signed. Now whether the reasons which the court gave in support of the ruling excepted to were erroneous or not is wholly immaterial. What this court must determine is whether the testimony offered was admissible, and not whether a right or wrong reason was assigned for its rejection. What then was the testimony actually offered and rejected? It was simply an offer to prove by the witness, Diggs, then on the stand (if he could have so testified), that the plaintiff's reputation for credit and honesty among those in the same business with him in the city of Baltimore was bad. To the question by which it was sought to elicit from the witness this testimony the plaintiff objected, and it was this objection which the court sustained. The sustaining of this objection and the refusal to allow this question to be put to the witness was the ruling which the court was called upon to make and did make, and to which the defendant excepted, and which alone is before us for review. But it is clear that evidence of the plaintiff's bad reputation among a particular class of persons is not admissible in such an action. No case can be found to sustain the admission of such testimony. None of the decisions go further than to say that the general bad reputation or the notoriously bad character of the plaintiff may be admitted.

We must, therefore, affirm this judgment whatever may be our opinion upon the general question argued at bar. If the

defendant had at the trial witnesses who could have proved the plaintiff's general bad repute or notoriously bad character for honesty or integrity before he made the criminal charge against him, it was his duty to have called them, or one of them to the stand and propounded appropriate questions for the purpose of eliciting such proof, and then upon objection made and sustained by the court and an exception taken, the question would have been presented for review in this court, and it would have been a real and substantial question in the cause. But if he had no witnesses ready so to testify he was not injured by the opinion of the court expressed, even though it were erroneous and the subject of an exception. It was not competent for him simply to make an offer of proof which he had no witnesses to sustain, and insist upon the court deciding the question which that offer raised, for that would be invoking from the court below and from this court a decision upon a mere moot question. If such a practice were allowed it would be quite possible for a party, without having any witnesses at all to the point, to raise any controverted or difficult question as to the admissibility of evidence, which the cause on trial admitted of, and obtain a reversal of the judgment against him, if the court below should, in the opinion of this court, have ruled erroneously on such a question. Nor was it competent for the defendant, as the exception shows was the case, to make an offer of proof, without stating he could sustain it by a competent witness, and for the purpose of sustaining it produce a witness who could only prove quite a different thing and whose testimony was clearly inadmissible, and then because the court rejected the testimony of such a witness, complain that besides rejecting it the court expressed an opinion that the proof contained in such general offer would be inadmissible even if witnesses should be called who could support it by their testimony. We should, therefore, be compelled to affirm this judgment, even if we were of opinion that under this declaration, and on the issue joined on the plea of not guilty, evidence of the general bad reputation of the plaintiff was admissible.[1]

[1] And so where a general objection is sustained without any reason assigned. Tooley v. Bacon, 70 N. Y. 34.

SECTION 3. DEMURRERS TO THE EVIDENCE.[1]

MIDDLETON v. BAKER.

Croke's Elizabeth, 752. [*1600.*]

EJECTIONE FIRMAE. It was held by all the court upon evidence to a jury that if the plaintiff in an *ejectione firmae,* or other action, gives in evidence any matter in writing or record, or a sentence in the spiritual court (as it was in this case), and the defendant offers to demur thereupon, the plaintiff ought to join in the demurrer, or waive the evidence, because the defendant shall not be compelled to put a matter of difficulty to lay gents, and because there cannot be any variance of a matter in writing; but if either party offers to demur upon any evidence given by witness, the other, unless he pleaseth, shall not be compelled to join; because the credit of the testimony is to be examined by a jury, and the evidence is certain (!), and may be enforced more or less, but both parties may agree to join in demurrer upon such evidence. And in the queen's case, the other party may not demur upon evidence shown in writing or record for the queen, unless the queen's counsel will thereto assent; but the court in such case shall charge the jury to find the matter special, as appears 34. Hen. 8, Dyer, 53. But this is by prerogative.

WORSLEY v. FILISKER.

2 Rolle, 117. [*1620.*]

The plaintiff in an *ejectione firmae* gave in evidence to the jury an indenture of bargain and sale enrolled in the Chancery, exemplified under seal, and in the fine of the exemplification there was a memorandum in this manner, viz., that the plea was enrolled, but no time of the enrollment was mentioned; the plaintiff offered to give divers circumstances in evidence by which he would prove that the enrollment was within six months, whereupon Sir Henry Yelverton, Attorney-General of the King, and

[1] For a review of the leading cases on demurrers to the evidence, see Slocum v. N. Y. Life Ins. Co., 228 U. S. 364 (1912).

counsel of the other party, offered to demur, claiming that the time of the enrollment by the statute of 27 H. 8, was made part of the record, and the enrollment for this reason could not be proved otherwise, because if a bargain and sale, and the enrollment within six months, should be pleaded, and afterwards if *nul tiel* record should be pleaded, it is a good plea, and the time of enrollment is a matter of record and can not be tried by the jury. If the plaintiff will not join in the demurrer, then he ought not (?) to be non-suited, by DODRIDGE, J., and SIR HENRY MONTAGUE, C. J., *vide* 4 Coke, Hinds' case accord.[1]

SIR HENRY YELVERTON. We wish to demur, and the plaintiff is held to join with us, and the court can not exclude us from our demurrer. DODRIDGE. Although the plaintiff can not refuse to join in the demurrer unless he will waive his evidence, yet the court is not bound, but may deny and hinder you from demurring by overruling the matter if it seems clear to them in law.[2] See 5 Coke, Baker's case. SIR HENRY YELVERTON, Attorney-General, the time of the enrollment should be inserted in the record, because this is made a part of the record by the statute of 27 H. 8, and if it should be omitted, although it was actually enrolled within six months, the bargain and sale is void. MONTAGUE, C. J., and HAUGHTON held *contra,* because the statute says, "except it be enrolled," therefore it is sufficient if it was enrolled. And while this matter was in debate, a clerk was sent to the Office of Enrollment to learn their usage and custom, and whether they were accustomed to insert the time of enrollment, and he returned and certified to the court on his oath that they said to him that before the year of 16 Elizabeth, at which time the Office of Enrollment was established, they did not insert the time, but their custom was to do so now; and the enrollment of the bargain and sale in question in this case was made in 5 Elizabeth, wherefore SIR HENRY MONTAGUE, the Chief Justice, with the assent of the court, referred this to the jury upon the evidence which the plaintiff had produced, whether this was enrolled or not.

[1] See Crawford v. Jackson, 1 Rawle, 427, where verdict was directed for defendant on plaintiff's refusal to join.

[2] As to the discretion of the Court to refuse to compel a joinder in demurrer where the evidence is clearly against the demurrant, see University v. Snyder, 100 Va. 567.

HALL v. BROWDER'S ADMINISTRATORS.

4 Howard (Miss.), 224. [*1839.*]

Mr. Justice SMITH delivered the opinion of the court.

This was an action of trover instituted by Jno. F. Carmichael, as administrator *de bonis non* of Harriet Browder, deceased, in the Circuit Court of Wilkinson county, to recover damages for the conversion of thirty-four bales of cotton.

Christopher E. Hall, who is the appellant in this court, and who was the defendant in the suit below, filed his demurrer to the evidence adduced by the plaintiff on the trial in support of his demand, and the facts established by this evidence are stated and admitted upon the record. Upon the demurrer to the evidence there was joinder by plaintiff, and a decision of the court overruling the same. After which decision, the cause was submitted to the jury upon the evidence thus demurred to; who, having found for the plaintiff the amount of damages sustained by him by reason of the conversion, judgment final was entered for the amount of the verdict.

From this decision and judgment of the court the defendant has appealed, and insists before this court that there was error in the proceeding below, in the following particulars, to wit:

1. That there was error in submitting the cause to a jury upon the evidence, after overruling the demurrer; whereas the court ought to have pronounced a final judgment upon the demurrer. And 2. That there was error in overruling the demurrer to the evidence offered at the trial.

To test the correctness of the first proposition it is necessary to inquire into the object and effect of a demurrer to evidence.

A demurrer in law is the tender of an issue in law, upon the facts which have been established by the pleadings, and a demurrer to the evidence is a tender of an issue in law upon the facts established by the evidence, and by necessity involves the admission of the truth of the facts intended to be proved by the evidence. The object of a demurrer to evidence then, is to raise the question of the relevancy, or the sufficiency in law of the facts intended to be proved, and by it admitted to be true, to maintain the issue in favor of the adverse party. This proceeding exchanges the issue in fact, which is made up and closed to the jury, to an issue in law, and transfers it to the court.

It is the peculiar province of the jury, to decide upon the weight of the evidence, in reference to the facts put in issue by the pleadings; but the necessary incidents of a demurrer to evidence supersedes this office of the jury, and makes the determination of the issue in fact, dependent upon the decision of the question of law. It follows, therefore, as the inevitable effect of a demurrer to evidence, to which there is a joindure, that the jury are discharged from the further consideration of the issue submitted in the first instance to them. The court, therefore, erred in not rendering judgment on the demurrer, and awarding a writ of enquiry to assess the damages, consequent upon the trover and conversion, instead of submitting the cause in chief to a jury.[1]

WRIGHT v. PINDAR.[1]

Aleyn, 18. [*B. R. 1648.*]

In a trover and conversion brought by an administrator, upon not guilty pleaded, the defendant upon the evidence confesses,

[1] Accord: Gluck v. Cox, 90 Ala. 331; Knox v. Garland, 7 Call. (Va.) 241. The demurrant is not entitled to have the case reopened for further proof. Galveston Ry. v. Templeton, 87 Tex. 42.

The damages may be assessed conditionally by the first jury, or a new jury may be called for that purpose. Gluck v. Cox, 90 Ala. 331.

[1] The following account of this case is given in Style 22.

The Case of Wright and Pynder was moved again to have the judgment of the Court. Roll, J., said, that matter of fact ought to be agreed in a demurrer to an evidence, otherwise the Court cannot proceed upon the demurrer, for the judges cannot try the matter in fact, for that were for the judges to give the verdict, which belongs to the jury to do, and to waive the matter in law, which they should determine, and he said, that if a deed be pleaded the party must show it in Court, but if it be given in evidence it is not necessary to show it if it can otherwise be proved to the jury, and so is it of a record given in evidence, and cited one Worsley's Case, 17 Jac. Rolls, J., took also two other exceptions to the pleading. 1. That the goods mentioned in the schedule appear not to be the same contained in the declaration. 2. No title is made to the indenture by him who brings the action, and concluded upon the whole matter that the demurrer was not good, and that there ought to be a venire *facias de novo* to try the matter again. Bacon,

that he did convert them to his own use; but further saith, that the intestate was indebted to the king, and that 18 May, 14 Car., it was found by inquisition that he died possessed of the goods in question; which being returned, a *venditioni exponas* was awarded to the sheriff, who, by virtue thereof, sold them to the defendant. And to prove this the defendant showed the warrant of the treasurer, and the office-book in the exchequer, and the entry of the inquisition, and the *venditioni exponas* in the clerk's book; to which the plaintiff[2] saith, that the matter alleged is not sufficient to prove the defendant not guilty; and that there was no such writ of *venditioni exponas*. And the defendant saith, that the matter is sufficient, and that there was such a writ. And it was resolved, that he that demurs upon the evidence ought to confess the whole matter of fact to be true, and not refer that to the judgment of the court. And if the matter of fact be uncertainly alleged, or that it be doubtful whether it be true or no, because offered to be proved only by presumptions and probabilities, and the other party will demur thereupon, he that alleges this matter cannot join in demurrer with him, but ought to pray the judgment of the court, that he may not be admitted to his demurrer, unless he will confess the matter of fact to be true. And for that the defendant did not so in this case, both parties have misbehaved themselves, and the court cannot proceed to judgment. But it was clearly agreed, that upon evidence the court for reasonable cause, at their discretion, may permit any

J., much to the same effect, but differed in this, that there ought not to be a venire *facias de novo*, but said that judgment ought to be given against one party, to wit, the defendant, for ill joining in demurrer, to the intent the party that is not in fault may be dismissed, and the parties here have waived the trial *per pays* by joining in demurrer. But Roll answered that no judgment at all could be given, for both parties be in fault, one by tendering the demurrer, the other by joining in it, and the defendant might have chosen whether he would have joined or no, but might have prayed the judgment of the Court whether he ought to join. The Court advised to search precedents for a venire *facias de novo* after a demurrer upon an evidence, and if there be any, they held that the same jury ought to come again, and not another. Roll said, if a special verdict be found insufficient, a new venire *facias* ought to issue, and he saw no difference between that and this case.

[2] Generally the party holding the affirmative of the issue can not demur to the evidence of the adverse party. Pickell v. Isgrigg, 6 Fed. 676; Bennett v. Perkins, 47 W. Va. 425; Stiles v. Inman, 55 Miss. 469.

matter to be shown to prove a record, Com. 411 b. And the opinion of the court was, that an alias *venire facias* should be awarded, and not a *venire de novo*, because no verdict was given.

FITZ-HARRIS v. BOIUN.

1 Levinz, 87. [*B. R. 1662*]

Error of a judgment in the Palace Court in assumpsit, where to prove the consideration an arrest was to be proved by the plaintiff; and for that he did not produce the writ,[1] the defendant demurred on the evidence, and thereupon judgment was given for the plaintiff; and now to reverse the judgment it was said for the plaintiff in error, that the king's writs are matters of record, and are not to be proved but by themselves; and it was agreed by the Court that the writ ought to have been produced in evidence, but by the demurrer it is confessed, the arrest being matter of fact, though it be to be proved by a matter of record, and the jury might of their own knowledge know that there was a writ. Dyer 239. Plowd. Com. Scholastica's case. And by the demurrer on the evidence all matters of fact are confessed that the jury could not know of their own conusance and the judgment was affirmed.

CORT v. BIRKBECK.

1 Douglas, 218. [*B. R. 1779.*]

Lord MANSFIELD. This is an action on the case, in which the plaintiff states, precisely and specially, his ground of action, which is (as stated in the first and fifth counts), that he is possessed of certain mills at Settle, and that no tenant, inhabitant, and resident within the manor can spend or use corn ground which has not been ground at the plaintiff's mills. The breach

[1] See Chichester v. Philips, T. Raymond 405, *post* 317.

assigned is, that the defendant used ground within the manor, several quantities of corn, etc., which the defendant well knew to have been ground elsewhere than at the plaintiff's mills. To this the defendant has pleaded not guilty. The issue is—on the custom,—the defendant being subject to it,—and the breach. The plaintiff must prove all the three points. The defendant does enough if he disprove any of them. The parties go to trial by the authority of the court, to inquire into the truth of these facts. This is not like an ejectment or an action for money had and received, where conclusions only are stated in the declaration, and the premises appear in evidence. Everything to be proved is here set forth, and they have nothing to do at the trial with the question, whether the facts as alleged in the declaration are or are not sufficient to entitle the plaintiff to recover. If that had been intended to be disputed, it might have been done *in limine*, by a demurrer to the declaration. As to the evidence, it seems to me that the custom established by the decree in the Court of Exchequer is the same, in substance, with that on which this action is brought. It is admitted on the record that the mills are the same and that the defendant is resient in the manor. (His Lordship then stated all the material part of the evidence.) To this evidence the defendant has demurred, and the only question is whether, if the jury believed the evidence, it is competent to maintain the issue.[1] As to that question, there is no doubt but the proceedings in the Exchequer are evidence to prove the custom and that the parol testimony of Armistead is evidence to show that the defendant used flour not ground at the plaintiff's mills. The demurrer seems to be founded on a mistake concerning the nature of this proceeding. It was argued as if it had been a demurrer to the declaration, or a motion in arrest of judgment, on the objection that the custom could not be supported in law beyond the case of corn in a grindable state, and could not extend to flour imported or given to inhabitants, and ground before it came to their possession. But that is not now before the court; nor was it under the cognizance of the jury. Nothing can be stronger to show

[1] In Cocksedge v. Fanshaw, 1 Douglas 118, the same judge observed: "But what is now brought before this Court on this demurrer? Not a question whether the evidence was sufficient to satisfy the jury of the fact of the custom, for, by the demurrer, the defendant admits every fact which the jury could have found upon the evidence."

this than the judgment which we must give, viz., "That the evidence was sufficient to maintain the issue." This will not be final. The consequence will be the same as if a verdict had been given for the plaintiff. But there is one defect which would not have been, if there had been a verdict, namely, that no damages have been assessed, and therefore there must be a writ of inquiry. After that the defendant may take advantage of any objection to the declaration by moving in arrest of judgment or bringing a writ of error. We are all of opinion that the evidence was sufficient.

GIBSON v. HUNTER.

2 H. Blackstone, 187. [*House of Lords, 1793.*]

Assumpsit by the holder against the acceptors of a bill of exchange payable to a fictitious payee, and endorsed, after acceptance, by the drawers in the name of the fictitious payee for value to the plaintiff. Evidence was given of a long course of dealings in similar bills between the drawers and acceptors for the purpose of raising an inference from these circumstances that, at the time of accepting the bill, the defendants knew the payee to be fictitious. The defendants demurred to the evidence and the plaintiff was forced to join.[1] Judgment was entered for defendants on the demurrer, and the plaintiff sued out a writ of error.[2]

[1] The demurrer in this case, after reciting the evidence at length, concluded as follows: "And the said Thomas Gibson and Joseph Johnson say, that the aforesaid matters, to the jurors aforesaid, in form aforesaid, shown in evidence by the said Robert Hunter, are not sufficient in law to maintain the said issue within joined on the part of the said Robert Hunter, and that they, the said Thomas Gibson and Joseph Johnson, to the matters aforesaid, in form aforesaid shown in evidence, have no necessity, nor are they obliged by the law of the land to answer; and this they are ready to verify: wherefore, for want of sufficient matter in that behalf, shown in evidence to the jury aforesaid, the said Thomas Gibson and Joseph Johnson pray judgment, and that the jury aforesaid may be discharged from giving any verdict in the said issue, and that the said Robert Hunter may be precluded from having his said action against the said Thomas Gibson and Joseph Johnson."

[2] This condensed statement is taken from Gould on Pleading, p. 466.

Lord Chief Justice EYRE thus delivered the unanimous answer of the judges.

The questions referred by your Lordships to the judges arise upon a proceeding which is called a demurrer to evidence and which, though not familiar in practice, is a proceeding well known to the law. It is a proceeding by which the judges, whose province it is to answer to all questions of law, are called upon to declare what the law is upon the facts shown in evidence analogous to the demurrer upon facts alleged in pleading. My Lords, in the nature of the thing, the question of law to arise out of the fact cannot arise till the fact is ascertained. It is the province of a jury to ascertain the fact, under the direction and assistance of the judge; the process is simple and distinct, though in our books there is a good deal of confusion with respect to a demurrer upon evidence, and a bill of exceptions, the distinct lines of which have not always been kept so much apart as they ought to have been.[3]

My Lords, in the first stage of that process, under which facts are ascertained, the judge decides whether the evidence offered

[3] Simrall, C. J., in Stiles v. Inman, 55 Miss. 469 (1877): "On account of the advantages of this mode of procedure, by which the case is withdrawn from the jury and referred to the Court for its judgment on the law arising on the facts, it is growing in favor with the profession. But this case is another example of what we have on a former occasion remarked: that the manner in which it may be availed of is not well or generally understood.

"There was no mode in which the jury could be compelled to find a special verdict. The demurrer to the evidence is a convenient substitute for the special verdict. The special verdict introduces into the record the facts. The demurrer upon the evidence does precisely the same thing. The whole operation is under the supervision of the Court, and it should never be allowed, if it is not a proper case, or if the facts are not correctly and fully stated. 2 Tidd's Pr. 865.

"It is altogether irregular to make the demurrer to the evidence matter of record by bill of exceptions. It is as much part of the record proper as the demurrer to pleadings, or the verdict of the jury. Both are of the same nature: the former takes the opinion of the Court on the facts shown in the pleadings; the latter, on the facts shown in evidence.

"The correct formula is to reduce to writing a recitation, first, of the organization of the jury; second, a statement of the facts shown in evidence by the plaintiff in support of the issue on his side; and then conclude with the allegation that the said matters are not sufficient in law to maintain the plaintiff's issue — wherefore he prays judgment, etc.

"The writing incorporating the

conduces to the proof of the fact which is to be ascertained; and there is an appeal from his judgment by a bill of exceptions. The admissibility of the evidence being established, the question how far it conduces to the proof of the fact which is to be ascertained is not for the judge to decide, but for the jury exclusively; with which judges interfere in no case, but where they have in some sort substituted themselves in the place of the jury in attaint, upon motions for new trials. When the jury have ascertained the fact, if a question arises whether the fact thus ascertained maintains the issue joined between the parties, or, in other words, whether the law arising upon the fact (the question of law involved in the issue depending upon the true state of the fact) is in favor of one or other of the parties, that question is for the judge to decide. Ordinarily he declares to the jury what the law is upon the fact which they find, and then they compound their verdict of the law and fact thus ascertained. But if the party wishes to withdraw from the jury, the application of the law to the fact, and all consideration of what

matters of fact and the formal demurrer should be transcribed on the minutes of the Court, and thereby become parcel of the record. 2 Tidd's Pr.; Walk. Am. Law, 609.

"For the purpose of curing the irregularities in our practice, we have been thus minute in the description of the nature and function of this pleading; and we append to this opinion an approved form of it.

"The demurrant in this case made a wide departure from the established practice.

"The demurrer, embracing the facts shown in evidence, was not spread on the minutes, nor otherwise manifested, except by the bill of exceptions.

"We are not inclined to overlook such grave irregularities as occurred in this case. In reality, the demurrer must have been put in *ore tenus;* and there would have been not so much as a written memorial of it in the papers, but for the necessity of bringing the case to this Court, when it was disclosed in the bill of exceptions.

"It need hardly be said that this demurrer may be taken to the evidence of that party on whom is the burden of proof—that is, the party who assumes the affirmation of the issue. It follows that the plaintiff may demur to the evidence of the defendant adduced to maintain an affirmative issue by him.

"The judgment is reversed and a repleader awarded, and cause remanded."

See Golden v. Knowles, 120 Mass. 336, disregarding an oral demurrer. A bill of exceptions is not necessary to preserve the evidence on demurrer. Ry. v. Sparrow, 98 Va. 630. But it seems that a bill of exceptions may be necessary to preserve the question that the party was erroneously compelled to join in a demurrer which did not contain all of the proper admissions. Crowe v. People, 92 Ill. 230.

the law is upon the fact, he then demurs in law upon the evidence, and the precise operation of that demurrer is to take from the jury and to refer to the judge, the application of the law to the fact. In the nature of things, therefore, and reasoning by analogy to other demurrers, and having regard to the distinct functions of judges and of juries, and attending to the state of the proceeding in which the demurrer takes place, the fact is to be first ascertained.

My Lords, with this short introduction, I proceed to the first question proposed to the judges, which is, "Whether upon the state of the evidence given for the plaintiff in this case it was competent to the defendants to insist upon the jury being discharged from giving a verdict by demurring to the evidence and obliging the plaintiff to join in demurrer?" Your Lordships' question is confined to this particular case; but it will be necessary for me to proceed by steps. All our books agree that, if a matter of record, or other matter in writing, be offered in evidence in maintenance of an issue joined between the parties, the adverse party may insist upon the jury being discharged from giving a verdict, by demurring to the evidence, and obliging the party offering the evidence to join in demurrer. He cannot refuse to join in demurrer; he must join or waive the evidence. Our books also agree that if parol evidence be offered, and the adverse party demurs, he who offers the evidence may join in demurrer if he will. We are therefore thus far advanced, that the demurrer to evidence is not necessarily confined to written evidence. The language of our books is very indistinct upon the question, whether the party offering parol evidence should be obliged to join in demurrer. Why is he obliged to join in demurrer, when the evidence which he has offered is in writing? The reason is given in Croke's report of Baker's case, because, says the book, "there cannot be any variance of matter in writing." Parol evidence is sometimes certain, and no more admitting of any variance than a matter in writing, but it is also often loose and indeterminate, often circumstantial. The reason for obliging the party offering evidence in writing to join in demurrer applies to the first sort of parol evidence, but it does not apply to parol evidence which is loose and indeterminate, which may be urged with more or less effect to a jury, and least of all will it apply to evidence of circumstances, which evidence is meant to operate beyond the proof of the existence of those

circumstances, and to conduce to the proof of the existence of other facts. And yet, if there can be no demurrer in such cases, there will be no consistency in the doctrine of demurrers to evidence, by which the application of the law to the fact on an issue is meant to be withdrawn from a jury and transferred to the judges. If the party who demurs will admit the evidence of the fact, the evidence of which fact is loose and indeterminate, or, in the case of circumstantial evidence, if he will admit the existence of the fact which the circumstances offered in evidence conduce to prove, there will then be no more variance in this parol evidence than in a matter in writing, and the reasons for compelling the party who offers the evidence to join in demurrer will then apply, and the doctrine of demurrers to evidence will be uniform and consistent. That this is the regular course of proceeding, in respect to parol evidence of the nature that I have been describing, I think may be collected from the known case upon this subject, Baker's case. There is also another case, Wright v. Pindar, as it stands reported in Aleyn's Reports, which carries the doctrine further, and home to every case of evidence circumstantial in its nature, affording ground for a conclusion of fact from fact; and the two cases taken together, I think, prove satisfactorily that the course is that which I have already supposed, and which would remove all the difficulties that are in the way of obliging the party to join in demurrer upon parol evidence. Baker's case, after stating that the party must join in demurrer, or waive his evidence, where a matter in writing is shown in evidence, goes on thus: "If the plaintiff produces witnesses to prove any matter in fact upon which a question in law arises, if the defendant admits their testimony to be true, there also the defendant may demur in law upon it, but then he ought to admit the evidence given by the plaintiff to be true." Those cases have very carefully marked the precise ground upon which a party may demur to evidence, and prove that if a party may demur, the other party must join in demurrer. According to Aleyn's report of the case of Wright v. Pyndar, which case underwent very serious consideration, it was resolved, "that he that demurs upon the evidence ought to confess the whole matter of fact to be true, and not refer that to the judgment of the court; and if the matter of fact be uncertainly alleged, or that it be doubtful whether it be true or no, because offered to be proved by presumptions or probabilities, and the other party demurs

thereupon, he that alleges this matter, cannot join in demurrer with him, but ought to pray the judgment of the court, that he may not be admitted to his demurrer, unless he will confess the matter of fact to be true." It seems to follow as a necessary conclusion, that if he will confess the matter of fact to be true, there he is to be admitted to his demurrer, and that if he is admitted, the other party must join in demurrer. My Lords, it is said in some of our books that upon a demurrer entered upon parol evidence the party offering the evidence may choose whether he will join in demurrer or not. But after having stated the two authorities which I have mentioned, I think those passages in the books must be understood with the qualification mentioned in both those authorities, "unless the adverse party will confess the evidence to be true." The matter of fact being confessed, the case is ripe for judgment in matter of law upon the evidence, and may then be properly withdrawn from the jury; and, being entered on the record, will remain for the decision of the judges. And this operation of entering the matter upon record, and indeed the whole operation of conducting a demurrer to evidence, ought to be under the direction and control of the judge at *nisi prius*, or of the court, if the trial be at the bar of one of the king's courts. I take the whole proceeding upon a demurrer to evidence to be under the control of the judge before whom the trial is had. In the case of Worsley v. Filisker, which is reported in 2 Rolle's Reports, 117, Mr. Justice DODDERIDGE, who was one of the ablest men upon the bench, said, "the court might deny and hinder a party from demurring by overruling the matter in demurrer, if it seemed to them to be clear in law"; and the court did in point of fact, in that case, overrule the demurrer and leave the case to the jury. The demurrer in that case was certainly frivolous; but if it had been overruled improperly, it might, I presume, have been the subject of a bill of exceptions. If the court may overrule, it may also regulate the entry of the proceedings upon the record, and the admissions which are to be made, previous to the allowing of the demurrer. And, my Lords, after this explanation of the doctrine of demurrers to evidence, I have very confident expectations that a demurrer like the present will never hereafter find its way into this House.

My Lords, the answer to the first question that the judges have agreed upon, and which I have endeavored to lay a foundation for, in what I have now offered to the House, is, "That upon the

state of the evidence given for the plaintiff in this case, it was not competent to the defendants to insist upon the jury being discharged from giving a verdict, by demurring to the evidence and obliging the plaintiff to join in demurrer, without distinctly admitting upon the record every fact and every conclusion which the evidence given for the plaintiff conduced to prove."

Your Lordships' second question is, Whether, on this record, any judgment can be given? To which we answer, that we conceive no judgment can be given. The examination of the witnesses in this case has been conducted so loosely, or this demurrer has been so negligently framed, that there is no manner of certainty in the state of facts upon which any judgment can be founded. I will not detain your Lordships with particular observations upon the state of the facts as they are contained in this demurrer, because all the observations I could have made were made to your Lordships from within your House at the time these questions were put, and, I believe, felt by everybody that heard them.

To the third question, In case no judgment can be given, what ought to be awarded? We answer, that there ought to be an award of a venire *facias de novo:* the issue joined between these parties, in effect, has not been tried, and the case of Wright v. Pyndar is expressly in point, that another venire *facias* should issue.

Accordingly a venire *de novo* was awarded.

STEPHENS v. WHITE.

2 Washington (Va.) 203. [*1796.*]

This was an action on the case brought by the appellant against the appellee in the District Court of Winchester. The declaration states that the plaintiff by the advice of the defendant, who was an attorney authorized to practice law, commenced in November, 1779, in the County Court of Frederick, an action of debt for £62 against B. Chambers, executor of William Williams, and then and there employed the defendant to prosecute the said suit to judgment, who in consideration thereof undertook to conduct the same to the best of his skill and judgment; yet the defendant had neglected to do his duty as an attorney, by failing to file a

declaration, whereby the judgment obtained in the said suit was reversed, and the plaintiff had lost his said debts of £62 and costs, and had sustained injury to £—. Plea not guilty.

At the trial the defendant filed a demurrer to the evidence, stating that the plaintiff had proved, by one witness, that after the judgment against Chambers had been obtained, the defendant requested the witness to inform the plaintiff, "that he had recovered a judgment against Chambers in the suit in which the defendant had been employed by the plaintiff." That it also appeared from the docket of the court in which the judgment was obtained that in July, 1784, the letter W was placed opposite to the said suit, and the clerk of that court proved that it was customary to write the initial letter of the attorney's name opposite to the suit in which he was concerned; that the letter W, on that docket, was intended to denote that the defendant appeared as attorney at that court for the plaintiff. The same witness declared that he believed Peter Hogg, then a practicing attorney, ordered the said suit for the plaintiff, but of this he was not certain. That from the same docket it appeared the suit was instituted in November, 1779, and that in March, 1780, no attorney appeared of record for the plaintiff; that the suit was put to issue in March, 1783, and it did not appear from any evidence that the defendant appeared as attorney in that suit before July, 1784. That the verdict was given in October, 1784, in favor of the plaintiff for £61 19s. 3d. debt and £49 11s. 4d. damages, and that the same was written on the back of an award, which was the only paper except the writ now filed in that cause. That the judgment was reversed with costs for the want of a declaration. That it did not appear that P. Hogg was marked as an attorney upon that docket after the year 1778. That Chambers always had been, and yet is, a resident in the state of Pennsylvania.

The demurrer being joined, the jury found a verdict for the plaintiff, and assessed his damages at £146 18s. 7d., subject to the opinion of the court upon the demurrer to evidence.

The defendant then moved in arrest of judgment, first, because there is no consideration stated in the declaration, and secondly, because no damages are laid.

Judgment for the defendant, from which plaintiff appealed.

ROANE, J. * * * The third point respects the demurrer to evidence. The judgment to be given is that the evidence is,

or is not, sufficient to maintain the issue joined on the part of the appellee. Of this the jury are the only competent judges, and therefore if the case be withdrawn from their decision by this mode of proceeding, the court must presume any and every fact which the jury might out of complicated testimony have inferred. But those conclusions of fact must be such as the jury might from a just and reasonable construction have made, and not arbitrary inferences, or such as might be drawn from a part only of the whole evidence.

The charge is that the defendant commenced and mismanaged the suit. The evidence of the first witness, if it stood alone, might correspond with this charge, since a jury might consider the message sent to the appellant as having reference to an en gagement before made to commence and prosecute the suit. But the appellant, not satisfied with this, produced the dockets of the court, which prove strongly, if not satisfactorily, that the appellee was not retained in the cause until July, 1784, and thus every presumption of an engagement at a prior period, arising out of the first piece of testimony, is completely demolished. With an accurate attention to the whole evidence, a jury could not reasonably and properly infer an original engagement, and consequently could not consider the charge laid in the declaration as being sustained. I therefore think that the District Court was wrong in the opinion given upon the motion in arrest of judgment, but that the judgment upon the demurrer to evidence is correct.[1]

FOWLE v. COMMON COUNCIL OF ALEXANDRIA.

11 Wheaton, 320. [*1826.*]

Mr. Justice STORY delivered the opinion of the Court.

This is a writ of error from the Circuit Court sitting at Alexandria for the District of Columbia. The original action was

[1] Under the Virginia practice it does not appear to be necessary to make formal admissions on the record, but the scope of the admissions will be determined by the Court. Green v. Judith, 5 Randolph, 1; Hansbrough v. Thom, 3 Leigh, 147. This appears to have been the English practice just prior to the decision in Gibson v. Hunter.

brought against the defendants to recover damages asserted to have been sustained by the plaintiff, in consequence of the neglect of the defendants to take due bonds and security from one Philip G. Marsteller, licensed by them as an auctioneer for the years 1815, 1816, 1817, and 1818, according to the express provisions of the statute in this behalf enacted.

At the trial below, upon the general issue, one of the principal points in controversy was, whether the said Marsteller was, in fact, licensed by the defendants as an auctioneer during the years above stated; and both parties introduced a good deal of evidence, for the purpose of supporting or repelling the presumption of the fact. The defendants demurred to the evidence as insufficient to maintain the plaintiff's action, and the record itself contains the whole evidence introduced at the trial, as well as that arising from the testimony of witnesses and that arising from written documents.

There is no joinder in demurrer on the record, which is probably a mere defect in the transcript, as the court proceeded to give judgment upon the demurrer in favor of the defendants. Without a joinder in demurrer, no such judgment could be properly entered; and such joinder ought not to have been required or permitted while there was any matter of fact in controversy between the parties.

Indeed, the nature of the proceedings upon a demurrer to evidence seems to have been totally misunderstood in the present case. It is no part of the object of such proceedings to bring before the Court an investigation of the facts in dispute, or to weigh the force of testimony or the presumptions arising from the evidence. That is the proper province of the jury. The true and proper object of such a demurrer is to refer to the Court the law arising from facts. It supposes, therefore, the facts to be already admitted and ascertained, and that nothing remains but for the court to apply the law to those facts. This doctrine is clearly established by the authorities, and is expounded in a very able manner by Lord Chief Justice EYRE, in delivering the opinion of all the judges in the case of Gibson v. Hunter, before the House of Lords. (2 H. Bl. Rep. 187.) It was there held, that no party could insist upon the other party's joining in demurrer, without distinctly admitting, upon the record, every fact and every conclusion which the evidence given for his adversary conduced to prove. If, therefore, there is parol evidence

in the case, which is loose and indeterminate, and may be applied with more or less effect to the jury, or evidence of circumstances, which is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of other facts, the party demurring must admit the facts of which the evidence is so loose, indeterminate, and circumstantial, before the court can compel the other side to join therein.[1] And if there should be a joinder without such admission, leaving the facts unsettled and indeterminate, it is a sufficient reason for refusing judgment upon the demurrer; and the judgment, if any is rendered, is liable to be reversed for error. Indeed, the case made for a demurrer to evidence is, in many respects, like a special verdict. It is to state facts, and not merely testimony which may conduce to prove them. It is to admit whatever the jury may reasonably infer from the evidence, and not merely the circumstances which form a ground of presumption. The principal difference between them is that, upon a demurrer to evidence, a court may infer, in favor of the party joining in demurrer, every fact of which the evidence might justify an inference; whereas, upon a special verdict, nothing is intended beyond the facts found.

Upon examination of the case at bar, it will be at once perceived that the demurrer to evidence, tried by the principles already stated, is fatally defective. The defendants have demurred, not to facts, but to evidence of facts; not to positive admissions, but to mere circumstances of presumption introduced on the other side. The plaintiff endeavored to prove, by circumstantial evidence, that the defendants granted a license to Marsteller as an auctioneer. The defendants not only did not admit the existence of such a license, but they introduced testimony to disprove the fact. Even if the demurrer could be considered as being exclusively taken to the plaintiff's evidence, it ought not to have been allowed without a distinct admission of the facts which that evidence conduced to prove. But when the demurrer was so framed as to let in the defendants' evidence, and thus to rebut what the other side aimed to establish, and to overthrow the presumption arising therefrom, by counter presumptions, it was the duty of the Circuit Court to overrule the

[1] Where the evidence is direct and certain, specific admissions on the record are not required. Ditto v. Ditto, 4 Dana, 502. See also, Valtez v. Ry., 85 Ill. 500, where judgment for defendant was affirmed, though the demurrer contained no express admissions.

demurrer, as incorrect and untenable in principle. The question referred by it to the court, was not a question of law, but of fact.

This being, then, the posture of the case, the next consideration is, What is the proper duty of this court, sitting in error? It is, undoubtedly, to reverse the judgment and award a venire *facias de novo*. We may say, as was said by the judges in Gibson v. Hunter, that this demurrer has been so incautiously framed that there is no manner of certainty in the state of facts upon which any judgment can be founded. Under such a predicament the settled practice is to award a new trial, upon the ground that the issues between the parties, in effect, has not been tried.

Judgment reversed and a venire facias de novo awarded.

WOODGATE'S ADMINISTRATRIX v. THRELKELD.

3 Bibb (Ky.), 527. [*1814.*]

The judgment in this case was rendered upon a demurrer to evidence tendered by the defendant, in which the evidence given on both sides is stated. This we apprehend cannot regularly be done.[1] The defendant could not by demurring cause his own evidence to be taken for true, and the court cannot without usurping the province of the jury decide upon its truth. In principle it is not less absurd for a party to demur to his own evidence, than it would be to demur to his own plea; and it is believed that there is no precedent to be found in the English books for the former, no more than there is for the latter practice.

The judgment must therefore be reversed and the cause remanded that a venire *facias de novo* may be awarded, etc.

[1] Accord, Fritz v. Clark, 80 Ind. 591.

In Virginia it appears that evidence for the demurrant can be considered so far as it is not impeached and not inconsistent with the evidence demurred to. Green v. Judith, 5 Randolph 1. And parts of the evidence demurred to, favorable to the demurrant, are taken into account. Oeters v. Supreme Lodge, 98 Va. 201.

But see Hart v. Callaway, 2 Bibb, 460 (1811), holding it error to compel a joinder in demurrer after the demurrant had introduced his evidence.

THORNTON v. BANK OF WASHINGTON.

3 Peters, 36. [*1830.*]

Error to the Circuit Court of the County at Washington, in the District of Columbia.

This case was brought before the court to reverse the judgment of the Circuit Court on a demurrer to the evidence offered by the defendants in error, the plaintiffs below, to sustain a claim on Mr. Thornton as indorser on a promissory note discounted at the Bank of Washington for the benefit of one Bailey, the maker of the note.

The facts of the case are stated in the opinion of the court, delivered by Mr. Justice STORY.

Mr. Justice STORY, after stating the facts, delivered the opinion of the court:

This case comes before us on a demurrer to the evidence in the court below, taken by the original defendant, now plaintiff in error; and this in our judgment is very important to be considered in the determination of the case. The party who demurs to evidence seeks thereby to withdraw the consideration of the facts from the jury, and is therefore bound to admit not only the truth of the evidence as given, but every fact which that evidence may legally conduce to prove in favor of the other party. And if upon any view of the facts the jury might have given a verdict against the party demurring, the court is also at liberty to give judgment against him.

The defense set up against this action by the defendant is, that the transaction is usurious, within the meaning of the statute of Maryland against usury, which (it is admitted) is substantially like the English statute on the same subject. To sustain the defense, it has been urged that the receipts of the interest in advance for sixty-four days upon the discount of the note is usury. But we are all of opinion that the taking of interest in advance upon the discount of notes in the usual course of business by a bank is not usury. The doctrine has been long settled, and is not now open for controversy. The taking of the interest for sixty-four days is not usury, if the note, according to the custom and usage in the banks at Washington, was not due and payable until the sixty-fourth day. That custom was completely established, not only by the evidence in the present

case, but by that in Renner v. The Bank of Columbia, 9 Wheat. Rep. 581, which is referred to in this record. In the latter case it was expressly held by the court, that under that custom the note was not due and payable before the sixty-fourth day, for until that time the maker could not be in default.

Then, again, it is argued, that here there have been successive renewals of the note, or rather successive notes given by way of renewal of the original note, and that these renewals have been on the sixty-third day, and the money credited on that day, on account of the existing note; and thus in effect sixty-four days' interest has been taken upon loans for sixty-three days only. If there had been proved any contract between the bank and the party for whose benefit the original discount was made, that the original note should be so renewed from time to time, and the extra day's interest thereupon be taken by the bank, so that the bank would have been bound to make the renewal, and the party would have been bound to renew and not to pay the note at maturity, there would have been strong grounds on which to rest the argument. But the difficulty is that no such contract is to be found in the evidence, and the party demurring to the evidence asks the court to infer it from facts which do not necessarily import it, and may well admit of an explanation favorable to the other party. It is quite consistent with every fact in the case that the original discount may have been made without any such contract, and that the application for the renewals may have been made from time to time by the party interested for his own accommodation, and without any previous understanding or co-operation on the part of the bank. For aught that appears, he was at liberty to have paid the original note, or any one of those afterwards given, at the time when it became due. If of choice he had paid it on the sixty-third day instead of the sixty-fourth, there is no pretense to say that it would have been a case of usury. If, instead of payment, he offers a new note for discount, for the purpose of applying the proceeds to the payment or withdrawal of the former note, under the like circumstances, the case is not substantially varied. Each note is considered as a distinct substantive transaction. If no more than the legal interest is taken upon the time the new note has to run, the actual application of the proceeds of the new note to the payment of the former note, before it becomes due, does not of itself make the transaction usurious. Something more must occur. There must be a

contract between the bank and the party at the time of such discount, that the party shall not have the use or benefit of the proceeds until the former note becomes due, or that the bank shall have the use and benefit of them in the meantime. Such a contract being illegal it not to be presumed; it must be established in evidence. The argument requires the court to infer such illegality from circumstances in their own nature equivocal and susceptible of different interpretations; and this in favor of the party demurring to the evidence. Even if the jury might have made such an inference from the evidence, we think it ought not to be made by the court; for the rule of law requires the court in such a case to make every inference and presumption in favor of the other party which the jury might legally deduce from the evidence;[1] nor is this any hardship upon the party demurring to the evidence, for it is his own choice to withdraw from the jury, to whom it properly belongs, the consideration of the facts which he relies on as presumptive of usury.

Upon the other point suggested in the cause, whether banks are within the statute of usury, we entertain no doubt that they are. But, for the reasons already stated, we are of opinion that the judgment below ought to be affirmed.

[1] Morton, J., in Copeland v. New England Ins. Co., 22 Pickering, 135: "The evidence offered in this case tends to show, and undoubtedly does show, that the brig insured, in a squall (not a severe one to be sure), ran upon a coral reef and was totally lost. This proof, by itself, clearly would support the plaintiff's action. But the defendants contend that the testimony of the same witnesses tends to show, that the vessel was run on shore intentionally or through the gross incapacity of the master. Now these are distinct substantive facts, which the defendants wish to establish. It is true the evidence tends strongly, very strongly, to prove them. But the defendants cannot avail themselves of these grounds of defense on a demurrer to the evidence. If the plaintiffs' evidence does not show a *prima facie* case, the defendants may demur. But if they wish to set up any facts in defense, they must resort to the jury to have them established. The depositions introduced by the plaintiffs were taken by the defendants, and thus the facts may be presented in an order and a form most favorable to the latter. The defendants too, by demurring, admit the facts which the evidence conduces to prove for the plaintiffs, and cannot avail themselves of such as it tends to show for the defendants. The plaintiffs, by joining in the demurrer, did not admit the truth of that part of the testimony which is favorable to the defendants, much less any inferences which may be drawn from it. If the defendants wish to set up any facts to exonerate or discharge them, they must look to the jury to establish them."

COOLEY v. GALYON.

109 Tennessee, 1. [*1902.*]

Mr. Justice SHIELDS delivered the opinion of the court.

This is an action to recover damages for alleged slanderous words spoken by Cooley, the plaintiff in error, of and concerning Galyon, the defendant in error, while being examined as a witness before the master upon a reference to ascertain damages resulting from the wrongful suing out of an injunction issued in the case of Eckle *et al.* against the Florence Crittendon Home, lately pending in the Chancery Court of Knox county. Galyon and Cooley were both contractors and builders residing in Knoxville, and neither was a party to the chancery cause.

The declaration contains two counts—one in slander and one in libel—both predicated upon the same words, which are hereinafter set out, in stating the averments of a special plea filed by the defendant. It is averred that the words were falsely and maliciously spoken and published of and concerning the plaintiff, with respect to his occupation and business as a builder and contractor, to his damage, five thousand dollars.

The defendant filed a plea of not guilty, and a special plea in which he says that he uttered the language complained of while being examined as a witness in a suit pending in the Chancery Court of Knox county, styled "G. B. Eckle *et al.* v. Florence Crittendon Home," in answer to questions put to him by counsel in the said cause. * * * While this defense could have been made under the general issue, it could also be made by special plea. Shadden v. McElwee, 86 Tenn. 148 (5 S. W. 602; 61 Am. St. Rep. 821).

Issue was joined, and the case was tried by the circuit judge and a jury, and upon the trial the plaintiff introduced the solicitor of the complainants in the cause of Eckle and others against the Florence Crittendon Home, as a witness in his behalf, and had him identify the original bill, the answer, the decree denying the complainants relief, and ordering the reference to the master to ascertain the damages sustained by the defendant by reason of the wrongful issuance of the injunction, and the deposition given by defendant, Cooley, in the chancery cause; the original papers being used by consent, all of which were then read in evidence by the plaintiff.

Upon cross-examination the witness identified the depositions of other witnesses taken in the cause, the report of the master allowing damages to the defendant in that cause, and the decree confirming the same, which were then read to the jury by defendant's attorney. Other evidence was introduced by the plaintiff tending to prove that the defendant gave the deposition read, and entertained malice toward the plaintiff.

The proof introduced by the plaintiff sustained the averments of the special plea, and upon the conclusion of plaintiff's evidence the defendant filed a demurrer, in proper form, thereto, which was overruled by the court, and the damages of the plaintiff assessed by the jury at five hundred dollars, and judgment given therefor; and the defendant has brought the case before this court, and assigns error.

For the plaintiff it is said that the defendant, by calling out and reading in evidence those portions of the record in the chancery cause which the plaintiff had not offered, introduced original evidence in his behalf, and lost his right to demur to the evidence of the plaintiff, and that for this reason the action of the court in overruling the demurrer was correct, regardless of other questions. It is true that, if a defendant introduce any original evidence in his behalf, he cannot demur to the evidence of the plaintiff; but can it be said that the evidence elicited by the defendant in this case was original evidence? Clearly not. The plaintiff had introduced part of the record in the chancery cause, and it was perfectly competent for the defendant to call for the remainder of it. It would have been the better practice to have required the plaintiff to read the entire record; but, having failed to do so, the defendant had the right to call for the rest of it, and examine the witness then upon the stand in relation to it. This was legitimate cross-examination, in the strictest sense, as the evidence brought out related to and was germane to that elicited in the examination in chief. But whether germane or not, the defendant had the right to bring out upon cross-examination any matter pertinent to the issue; the rule in Tennessee being that the cross-examination is only limited by relevancy and competency of the evidence sought to be introduced, and the defendant, by exercising this right, is not precluded from demurring to the evidence. This question was fully discussed in the case of Sands v. Railway Co., 108 Tenn. 1 (64 S. W. 478), and the rule there stated as here applied.

The question upon which this case must be determined is whether the language imputed to the defendant is actionable. * * *

Applying these principles to this case, the question is not whether the words spoken by the defendant were false and malicious, but were they spoken in a judicial proceeding, and were they relevant and pertinent to the subject of inquiry in that proceeding, or responsive to questions propounded to the defendant by counsel while being examined therein as a witness? If they were, they are absolutely privileged, and the plaintiff's action must fail.

That the words were spoken in the course of a judicial proceeding is conceded; and the only question that remains to be determined is, Were the answers of the witness pertinent to the inquiry or responsive to the question asked by the counsel? The issue being tried in the chancery cause, in relation to which the defendant was examined as a witness for the Florence Crittendon Home, was what damages it had sustained by being delayed in building a house by the injunction issued against it; and defendant was called to testify as to the difference in the cost of material and construction at the time the injunction was issued and when the bill was dismissed, as bearing upon this issue. The plaintiff, Galyon, had offered to build the house for the same price for which the defendant had contracted it when enjoined, and the question arose whether he was a reliable contractor, and would and could comply with a contract to do the building if it were let to him; and, with a view of proving this, the witness was cross-examined by the solicitor for the complainants, and made the answers of which the plaintiff complains.

These answers were clearly pertinent to the investigation. If Mr. Galyon was a reliable contractor, his proposition to build the house tended to prove that the defendant had sustained no loss; and, if he was unreliable, the effect of the proposition as evidence was weakened. The answers were also fairly, and evidently intended to be directly, responsive to the questions propounded to the witness. If the plaintiff did not pay for the material he used in building, or did not use the character of material called for in his contract, he was not a reliable contractor.

We are of the opinion that the words spoken by the defendant of the plaintiff were, on account of the occasion, absolutely

privileged, and that no action can be maintained upon them. There is, therefore, no evidence to sustain a verdict against the defendant, and the demurrer to the plaintiff's evidence should have been allowed.[1]

The judgment of the Circuit Court is reversed, the demurrer sustained, and the plaintiff's suit dismissed.

SECTION 4. DIRECTION OF THE VERDICT.

(a) *When Proper.*

BUSHELL'S CASE.

Vaughan, 135. [*1670.*]

The King's Writ of Habeas Corpus, dat. 9 die, Novembris, 22 Car. 2, issued out of this court, directed to the then sheriffs of London, to have the body of Edward Bushell, by them detained in prison, together with the day and cause of his caption and detention, on Friday then next following, before this court, to do and receive as the court should consider; as also to have then the said writ in court.

[The sheriffs returned that the prisoners were held under the following order of commitment made at a session of the Court of Oyer and Terminer:]

Ordinatum est per Curiam hic quod Finis 40 *Marcarum separatim ponatur super* Edwardum Bushell, and other eleven persons particularly named, and upon every of them, being the twelve jurors then and there sworn, and charged to try several issues, then and there joined between our Lord the King and William Penn and William Meade, for certain trespasses, contempts, unlawful assemblies and tumults, made and perpetrated by the said Penn and Mead, together with divers other unknown persons, to the number of three hundred, unlawfully and tumultuously assembled in Grace-Church street, in London, to the disturbance of the peace, whereof the said Penn and Mead were then indicted

[1] See also, Corbett v. Smith, 108 Tenn. 368 (assumption of risk); Fowler v. Ry., 18 W. Va. 579 (contributory negligence); Gerity v. Haley, 29 W. Va. 98 (contributory negligence).

before the said justices. Upon which indictment the said Penn and Mead pleaded they were not guilty. For that they the said jurors then and there the said William Penn and William Mead of the said trespasses, contempts, unlawful assemblies and tumults, *Contra Legem hujus Regni Angliae, & contra plenam & manifestam Evidentiam, & contra directionem Curiae in materia Legis, hic, de & super p'missis eisdem Juratoribus versus p'fatos* Will. Penn & Will. Mead, *in Curia hic aperte datam, & declaratam de p'missis iis impositis in Indictamento p'dicto acquietaverunt, in contemptum D'ni Regis nunc, Legumque Suarum, & ad magnum inpedimentum & obstructionem Justitiae, necnon ad malum exemplum omnium aliorum Juratorum in consimili casu delinquentium. Ac super inde modo ulterius ordinatum est per Cur' hic quod p'fatus* Edw. Bushell *capiatur & committatur Gaolae dicti D'ni Regis de Newgate, ibidem remansurus quousque solvat dicto D'no Regi* 40 *Marcas p' fine suo p'dicto, vel deliberatus fuerit, per debitum legis cursum.*[1]

VAUGHAN, C. J. * * * I conclude, therefore, that this retorn, charging the prisoners to have acquitted Penn and Mead, against full and manifest evidence first; and next, without saying that they did not know and believe that evidence to be full and manifest against the indicted persons, is no cause of fine or imprisonment.

And by the way I must here note, that the verdict of a jury and evidence of a witness are very different things, in the truth or falsehood of them. A witness swears but to what he hath heard or seen generally, or more largely to what hath fallen under his senses; but a juryman swears to what he can infer and conclude from the testimony of such witnesses, by the act and force of his understanding, to be the fact inquired after; which differs nothing in the reason, though much in the punishment, from what a judge, out of various cases considered by him, infers to be the law in the question before him.

We come now to the next part of the retorn, viz., that the jury acquitted those indicted against the direction of the court in matter of law, openly given and declared to them in court.

1. The words, that the jury did acquit against the direction of the court in matter of law, literally taken, and *de plano,* are

[1] The statement has been condensed, and parts of the opinion omitted—Ed.

insignificant, and not intelligible; for no issue can be joined of matter in law, no jury can be charged with the tryal of matter in law barely, no evidence ever was, or can be given to a jury of what is law or not; nor no such oath can be given to, or taken by a jury, to try matter in law, nor no attaint can lie for such a false oath.

Therefore we must take off this veil and color of words, which make a show of being something, and in truth are nothing.

If the meaning of these words, finding against the direction of the court in matter of law, be, that if the judge having heard the evidence given in court (for he knows no other) shall tell the jury upon this evidence, the law is for the plaintiff, or for the defendant, and you are under the pain of fine and imprisonment to find accordingly, then the jury ought of duty so to do: Every man sees that the jury is but a troublesome delay, great charge, and of no use in determining right and wrong, and therefore the tryals by them may be better abolished than continued; which were a strange new-found conclusion, after a tryal so celebrated for many hundreds of years.

For if the judge, from the evidence, shall by his own judgment first resolve upon any tryal what the fact is, and so knowing the fact, shall then resolve what the law is, and order the jury penally to find accordingly: what either necessary or convenient use can be fancied of juries, or to continue tryals by them at all?

And how the jury should in any other manner, according to the course of tryals used, find against the direction of the court in matter of law, is really not conceptible.

True it is, if it fall out upon some special tryal that the jury being ready to give their verdict, and before it is given the judge shall ask, Whether they find such a particular thing propounded by him? or whether they find the matter of fact to be as such a witness or witnesses have deposed? and the jury answer, They find the matter of fact to be so; if then the judge shall declare, The matter of fact being by you so found to be, the law is for the plaintiff, and you are to find accordingly for him.

If notwithstanding they find for the defendant, this may be thought a finding in matter of law against the direction of court; for in that case the jury first declare the fact as it is found by themselves, to which fact the judge declares how the law is consequent.

And this is ordinary when the jury find unexpectedly for the

plaintiff or defendant, the judge will ask, How do you find such a fact in particular? And upon their answer, he will say, Then it is for the defendant, though they found for the plaintiff, or *è contrario;* and thereupon they rectifie their verdict.

And in these cases the jury, and not the judge, resolve and find what the fact is.

Therefore always in discreet and lawful assistance of the jury, the judge's direction is hypothetical, and upon supposition, and not positive, and upon coercion, viz., If you find the fact thus (leaving it to them what to find), then you are to find for the plaintiff; but if you find the fact thus, then it is for the defendant.

But in the case propounded by me, where it is possible in that special manner, the jury may find against the direction of the court in matter of law, it will not follow they are therefore finable; for if an attaint will lie upon the verdict so given by them, they ought not to be fined and imprisoned by the judge for that verdict; for all the judges have agreed upon a full conference at Serjeants Inn in this case. And it was formerly so agreed by the then judges, in a case where Justice HIDE had fined a jury at Oxford for finding against their evidence in a civil cause, that a jury is not finable for going against their evidence where an attaint lies; for if an attaint be brought upon that verdict, it may be affirmed and found upon the attaint a true verdict, and the same verdict cannot be a false verdict; and therefore the jury fined for it as such by the judge, and yet no false verdict, because affirmed upon the attaint.

But no case can be offered, either before attaints granted in general, or after, that ever a jury was punished by fine and imprisonment by the judge, for not finding according to their evidence and his direction, until Popham's time; nor is there clear proof that he ever fined them for that reason, separated from other misdemeanor. If juries might be fined in such case before attaints granted, why not since? For no statute hath taken that power from the judge. But since attaints granted, the judges resolved they cannot fine where the attaint lies, therefore they could not fine before. Sure this latter age did not first discover that the verdicts of juries were many times not according to the judge's opinion and liking.

But the reasons are, I conceive, most clear, that the judge could not, nor can, fine and imprison the jury in such cases.

Without a fact agreed, it is as impossible for a judge or any

other to know the law relating to that fact, or direct concerning it, as to know an accident that hath no subject.

Hence it follows, that the judge can never direct what the law is in any matter controverted, without first knowing the fact; and then it follows, that without his previous knowledge of the fact, the jury cannot go against his direction in law, for he could not direct.

But the judge, *quâ* judge, cannot know the fact possibly, but from the evidence which the jury have, but (as will appear) he can never know what evidence the jury have, and consequently he cannot know the matter of fact, nor punish the jury for going against their evidence, when he cannot know what their evidence is.

It is true, if the jury were to have no other evidence for the fact but what is deposed in court, the judge might know their evidence, and the fact from it, equally as they, and so direct what the law were in the case, though even then the judge and jury might honestly differ in the result from the evidence, as well as two judges may, which often happens.

But the evidence which the jury have of the fact is much other than that: for,

1. Being returned of the vicinage whence the cause of action ariseth, the law supposeth them thence to have sufficient knowledge to try the matter in issue (and so they must), though no evidence were given on either side in court; but to this evidence the judge is a stranger.

2. They may have evidence from their own personal knowledge, by which they may be assured, and sometimes are, that what is deposed in court is absolutely false; but to this the judge is a stranger, and he knows no more of the fact than he hath learned in court, and perhaps by false depositions, and consequently knows nothing.

3. The jury may know the witnesses to be stigmatized and infamous, which may be unknown to the parties, and consequently to the court.

4. In many cases the jury are to have view necessarily, in many by consent, for their better information; to this evidence likewise the judge is a stranger.

* * * * * * * * * * * * * *

7. To what end is the jury to be returned out of the vicinage whence the cause of action ariseth? To what end must

hundredors be of the jury, whom the law supposeth to have nearer knowledge of the fact than those of the vicinage in general? To what end are they challenged so scrupulously to the array and poll? To what end must they have such a certain freehold, and be *probi* and *legales homines*, and not of affinity with the parties concerned? To what end must they have in many cases the view, for their exacter information chiefly? To what end must they undergo the heavy punishment of the villainous judgment, if after all this they implicitly must give a verdict by the dictates and authority of another man, under pain of fines and imprisonment, when sworn to do it according to the best of their own knowledge?

A man cannot see by another's eye, nor hear by another's ear, no more can a man conclude or infer the thing to be resolved by another's understanding or reasoning; and though the verdict be right the jury give, yet they being not assured it is so from their own understanding, are forsworn, at least in *foro conscientiae*.

9. It is absurd a jury should be fined by the judge for going against their evidence, when he who fineth knows not what it is, as where a jury find without evidence in court of either side, so if the jury find upon their own knowledge; as the course is if the defendant plead *solvit ad diem* to a bond proved, and offers no proof, the jury is directed to find for the plaintiff, unless they know payment was made of their own knowledge, according to the plea.

And it is as absurd to fine a jury for finding against their evidence, when the judge knows but part of it; for the better and greater part of the evidence may be wholly unknown to him; and this may happen in most cases, and often doth, as in Graves and Short's Case, 40 El. Cro. f. 616.

That decantatum in our books, *ad quaestionem facti non respondent judices, ad quaestionem legis non respondent juratores*, literally taken, is true: for if it be demanded, What is the fact? the judge cannot answer it; if it be asked, What is the law in the case? the jury cannot answer it.

Therefore the parties agree the fact by their pleading upon demurrer, and ask the judgment of the court for the law.

In special verdicts the jury inform the naked fact, and the court deliver the law; and so is it in demurrers upon evidence, in arrest of judgments upon challenges; and often upon the judge's

opinion of the evidence given in court the plaintiff becomes nonsuit, when if the matter had been left to the jury they might well have found for the plaintiff.

The prisoners were discharged.

CHICHESTER v. PHILIPS.

T. Raymond, 404. [*B. R. 1680.*]

The plaintiff Philips in the action, brought the action first in C. B. in Ireland, and declared of the demise of Roger Masterson, Esq., for eleven years. Upon not guilty pleaded, and a trial at the bar in C. B. there was a bill of exceptions put in by the defendant, which was as follows: * * *

That the defendant gave in evidence to prove that she was not guilty, that the said Roger Masterson long before the said demise to the plaintiff, viz., 4 January, 1672, by indenture for money bargained and sold the premises to one Edward Chichester for 500 years, that the said Edward Chichester afterwards, viz., 14 February, 1673, did make his last will in writing, and thereof made his brother, John Chichester, his executor and William Hancock overseer. And to prove that he made the said will, she produced an instrument under the seal of the prerogative court of Canterbury, reciting the said will, and that the said John Chichester was beyond the seas, and a grant of the administration to the said William Hancock for so long time as the said executor shall be beyond sea, dat. 3 September, 1674. * * * Whereupon the said Elizabeth, without any further proof of the said will, desired the said justices that they would direct the jury that the said writings produced by her were conclusive evidence to prove that the said Edward Chichester made the said will, and so she was not guilty of the said trespass and ejectment.

Nevertheless the said justices did only direct the jury that the said writings were evidence, upon which they might find that the said Edward made the said will, but not that the same was conclusive evidence in that behalf, and so left it indifferently to the jury, whether the said Edward made the said will or no, though the plaintiff offered nothing against the said will, but the said letters of administration granted by the said archbishop

of Armagh; whereupon the jury found that the said Edward made no such will; thereupon judgment was given in B. B. for the plaintiff, and the defendant brought a writ of error in B. R. in Ireland, and there the judgment was affirmed; and now she hath brought a writ of error here, and assigns for error, the not allowing of the evidence to be conclusive, as in the bill of exceptions is alleged. And here also judgment was affirmed by the whole court, because though the evidence be conclusive, yet the jury may hazard an attaint if they please;[1] and the proper way for the defendant had been to have demurred upon the plaintiff's evidence. This question, whether the probate is conclusive, hath been variously allowed; but of later days it hath been adjudged, that nothing can be given in evidence against it, but forgery of it, or its being obtained by surprise.

COLLEGE OF PHYSICIANS v. LEVETT.

1 Lord Raymond, 472. [*1701.*]

The plaintiffs brought debt against the defendant for £25 for having practised physick within London five months, without license. Upon *nil debet* pleaded, it was tried before HOLT, chief justice of the king's bench in London at Guildhall, on Tuesday, the 18th of November, 1701, in Michaelmas term, 10 Will. 3. And the defendant's defense was, that he was a graduate doctor of Oxford. But it was ruled by HOLT, upon consideration of all the statutes concerning this matter, that he could not practise within London, or seven miles round, without license of the college of physicians. And by his direction a verdict was given for the plaintiffs.[1]

[1] The question as to the power of the Court to set aside a verdict and grant a new trial had been raised somewhat earlier in Slade's Case, Style 138 (1648).

[1] And so in Thomas v. Bishop, 2 Strange, 955 (1733).

The report seems to indicate that Lord Holt directed a verdict for plaintiff, on oral testimony in 1696, in Wilkinson v. Kitchin, 1 Ld. Raymond, 89, but it is probably inaccurate. In Wright v. Crump, 7 Modern, 1 (1702) the same judge is reported as saying: "If a jury give a verdict on their own knowledge, they ought to tell the Court so; but the fairer way had been for such of the jury as had knowledge of the matter, before they are sworn, to tell the thing to the Court, and be sworn as witnesses."

SYDERBOTTOM v. SMITH.

1 Strange, 649. [*1725.*]

In an action against the endorser of a promissory note, the chief justice directed the jury to find for the defendant, because the plaintiff had not proved [1] diligence to get the money of the drawer, being of the old opinion that the endorser only warrants upon the default of the drawer. *Vide* Collins v. Butler, *post.* 1087.

COMPANY OF CARPENTERS v. HAYWARD.

1 Douglas, 374. [*B. R. 1780.*]

This was an action on the case, against a carpenter, for the breach of a custom, which was laid to be, that none but members of the company (being a corporation by prescription), or their apprentices, or journeymen, should exercise, in Shrewsbury, or within a certain district round that town, any of the trades mentioned in the title of the company. The cause was tried the last assizes for Shropshire, before HEATH, Sergeant, and a verdict found for the plaintiffs. On Thursday, the 13th of April, Howorth obtained a rule to show cause why a nonsuit should not be entered, or a new trial granted; [1] and the case came on to be

[1] Rich v. Johnson, 2 Strange, 1142 (B. R. 1740): "In ejectment for mines the plaintiff proved himself lord of the manor, and that he was in possession thereof. But the same witness proving, that the defendants had had possession of the mines above twenty years; the Court upon a trial at bar held this no evidence to avoid the statute of limitations, there being no entry within twenty years upon the mines, which are a distinct possession, and may be different inheritances: and therefore directed the jury to find for the defendants."

[1] The practice of taking up such questions by bill of exceptions appears somewhat later, though it was tried in Chichester v. Philips (1680), *ante*, p. 317. Best, J., (in Bulkeley v. Butler, 2 B. & C., 434 [1824]): "The question appears so clear, that I certainly should abstain from saying anything upon it, were it not for the importance of all matters touching the law of evidence. At first I entertained a doubt, whether the objection raised could be taken advantage of by bill of exceptions. The respective offices of bills of exceptions and demurrers to evidence

argued, this day, by Bearcroft, for the plaintiffs, and Howorth, for the defendant. * * *

Lord MANSFIELD. 1. It was properly left to the jury to consider whether the evidence produced was sufficient to show that there was such a company; for that was a mere question of fact; and they were to decide on its existence, and whether it was originally created by a charter from the crown or was only a voluntary society. There was evidence of its existence as a corporation. 2. The witnesses rejected were clearly interested in the question. If the company had failed in establishing the custom, they would have been discharged from actions to which they are liable for the breach of it.

WILLES and ASHHURST, Justices, of the same opinion.

BULLER, Justice. 1. Whether there be any evidence is a question for the judge. Whether sufficient evidence is for the jury. 2. The objection to the witness produced for the defendant was certainly decisive; nor is it true that he could have had no other sort of witnesses. The employers might have been witnesses.

The rule discharged.

have not been very distinctly understood, as appears by the judgment of Eyre, C. J., in Gibson v. Hunter, 2 H. Bl. 187. It appears to me now, that this objection is open on a bill of exceptions, but that the party making it should not be placed in a better situation than if he had demurred to the evidence. Bills of exceptions were not known to the common law, but were introduced by the 13 Edw. 1 c. 31. Until that time, if the judge decided wrongly upon any point of law, the suitor was without remedy. The statute was made to relieve parties from that hardship, it should therefore receive a liberal exposition; for which reason, although it appears to have been applicable originally to decisions upon pleadings only (which at that time were carried on *ore tenus*), yet I think it may fairly be extended to such a case as the present. In the 2 Inst. p. 427, Lord Coke says it extends to cases where any material evidence given to any jury is by the Court overruled. I think we ought to go further, and say, that where there is not evidence to prove the issue to be tried, and the judge tells the jury there is, that is ground for tendering a bill of exceptions. But it may be asked what then is the office of a demurrer to evidence? It is this. If the party tenders a bill of exceptions, the evidence must be left to the jury; but if the party does not wish that, he may withdraw it from their consideration by a demurrer. If, however, he does not demur, he must not be placed in a better situation than if he did. Now, by a demurrer to evidence, all the facts of which there is any evidence are admitted, and all conclusions which can fairly and logically be deduced from those facts."

TOOMEY v. LONDON, ETC., RY. CO.

3 Common Bench (N. S.), 146. [*1857.*]

This was an action in which the plaintiff sought to recover damages against the London, Brighton and South Coast Railway Company for an injury sustained by the plaintiff from alleged negligence on the part of their servants.

The declaration stated, that, before and at the time of committing of the grievances thereinafter mentioned, the defendants were possessed of a public railway station, to-wit, at Forest Hill, for the reception of passengers in and by the defendants' railway, for the profit and advantage of the defendants, and by reason of the possession and use of the said railway station by the defendants for the purpose aforesaid, they ought to have kept the same in a reasonably safe and secure condition, and so as not to be dangerous to persons lawfully and properly using the same; nevertheless, the defendants failed in such duty, and by means of the mere neglect and default of the defendants in that behalf, the plaintiff, who was lawfully in and using the said station as a passenger of the defendants, and with their permission, and for their profit and advantage, fell through a door, which the defendants then carelessly, negligently, and improperly left open and unguarded, in the said station, and which was by the neglect and default of the defendants in that behalf dangerous to persons lawfully and properly using the same, into a deep cellar or hole, and thereby sustained divers bodily injuries, and became permanently wounded in health and disabled from following his trade of hawker, or otherwise earning his living, and was put to expense, and spoiled his clothes which he had on, and lost divers of his goods and money, which he had with him when he fell, and was and is otherwise injured. And the plaintiff claimed £500.

The defendants pleaded not guilty.

The cause was tried before CRESSWELL, J., at the first sitting at Westminster in this term. The facts were as follows: The plaintiff, a poor and illiterate person who carried on the employment of a hawker, went to the Forest Hill station of the London, Brighton and South Coast Railway, for the purpose of proceeding to London by the 10:30 P. M. train. Whilst waiting there, he inquired of a person on the platform, unconnected with the

railway, where he should find a urinary; this person told him to go to the right; he did so, and found two doors, upon one of which was painted the words "For gentlemen," and upon the other the word "Lamproom;" there being a light over the former, but none over the latter. The plaintiff, being in a hurry, and unable to read, opened the wrong door, stepped forward, and fell down some steps, breaking two of his ribs, and otherwise seriously hurting himself. There was no evidence as to the description of the steps down which the plaintiff fell, nor as to the state in which the door of the lamproom was ordinarily kept; but the plaintiff's son stated, that, when he went some time after the accident to look at the place he found the door locked.

On the part of the defendants, it was submitted that there was no evidence to go to the jury of negligence, and that the accident was attributable entirely to the plaintiff's own want of caution in going hastily and in the dark through a strange door.

The learned judge was of this opinion, and the plaintiff was nonsuited, with leave to move to enter a verdict for £35 (agreed damages), if the court should be of opinion that there was evidence which ought to have been submitted to the jury.

WILLIAMS, J. I am of opinion that there should be no rule in this case. I think there was no evidence of negligence on the part of the company or their servants which ought to have been submitted to the jury. It is not enough to say that there was some evidence; for, every person who has had any experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury; there must be evidence upon which they might reasonably and properly conclude that there was negligence.[1] All that appeared,

[1] In Bridges v. North London Ry. Co., 7 L. R. Eng. & Irish Appeals, 213, Mr. Justice Brett stated the test as follows: "The proposition seems to me to be this: are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain? It may be said that this is so indefinite as to amount to no rule, that it leaves the judge after all to say whether in his individual opinion the facts in evidence would prove the proposition; but I cannot think so. It is surely possible to admit that reasonable and fair men might come to a con-

was, that the plaintiff inquired of a stranger the way to the urinal, and, being told to go in a particular direction where there were two doors, unfortunately opened the wrong one, and through his own carelessness fell down some steps. If there had been any evidence to show that these steps were more than ordinarily dangerous, that possibly might have led to a different conclusion. But all that appears is, that the door in question led down some steps into a room which was used for the purposes of the company, and not for the convenience of the public. I cannot say that there was such evidence of negligence in the defendants as the learned judge was bound to leave to the jury.

WILLES, J. I am entirely of the same opinion. In order to establish a case of negligence against the defendants, it was incumbent on the plaintiff to prove some fact which was more consistent with negligence than with the absence of it. There was nothing of the sort proved here. There was nothing to show that the door and the steps beyond were more than ordinarily dangerous; and it was necessary and proper that something of the sort should be there for the convenient use of the station by the company. It would be difficult so to arrange every part of a station as to render it impossible for careless persons to meet

clusion which one's self would not arrive at. And judges may be able reasonably to say frequently, that although they would not upon the facts have come to the same conclusion to which the jury has come, yet they or he cannot say but that reasonable and fair men might agree with the conclusion of the jury; or, in other words, that, although they would not have arrived at the same conclusion, it is not contrary to reason to have arrived at it.

"The judge must, therefore, before directing the jury in the terms above set forth, first determine the following questions: Are there facts in evidence upon which, if unanswered, men of ordinary reason and fairness might fairly say that the plaintiff had been injured by some act of commission or omission by the defendants or their servants? Are there facts in evidence upon which, if unanswered, men of ordinary reason and fairness might fairly say that any such act of commission or omission was such as a person of reasonable care and skill under the same circumstances would have done or omitted to do? Are there facts in evidence upon which, if unanswered, men of ordinary reason and fairness might fairly say that the plaintiff had not, in a manner contributing to the accident, done anything or omitted to do anything which a person of ordinary care and skill under the same circumstances would not have done or would have done?"

See comments on this case by Lord Cairns in Metropolitan Ry. v. Jackson, L. R. 3 Appeal Cases (H. of L.) 193.

with injury. I think the plaintiff failed to make out that he sustained the injury complained of through any negligence of the company or their servants.

Rule refused.

RICHARDSON v. CITY OF BOSTON.

19 Howard, 263. [*1856.*]

GRIER, J. * * *

2. At the conclusion of the trial, the court, at the request of defendant's counsel, instructed the jury "that there was *not* sufficient evidence in the cause to authorize the jury to find the rights claimed by the plaintiff."

As it is the duty of the jury to decide the facts, the sufficiency of evidence to prove those facts must necessarily be within their province. The jury cannot assume the truth of any material averment without some evidence; and it is error in the court to instruct the jury that they may find a material fact of which there is no evidence. An instruction like this is imperative on a jury; it has taken the place, in practice, of a demurrer to evidence, and must be governed by the same rules. If there be "no evidence whatever,"[1] as in the case of Parks v. Ross (11

[1] See also, O'Kelly v. O'Kelly, 8 Met. 436. Similar statements are to be found in most of the states at this time. But in 1862, the rule was stated as follows in Denny v. Williams, 5 Allen (Mass.) 1: "In such cases, a refusal of the judge to instruct the jury that the evidence is insufficient is a good ground of exception. It is not necessary that there should be absolutely no evidence. The rule, as stated in Browne on the St. of Frauds, c. 15, sec. 321, is sustained by the authorities cited: 'Whether there has been a delivery and acceptance sufficient to satisfy the statute of frauds is a mixed question of law and fact. But it is for the Court to withhold the facts from the jury, when they are not such as can afford any ground for finding an acceptance; and this includes cases where, though the Court might admit that there was a scintilla of evidence tending to show an acceptance, they would still feel bound to set aside a verdict finding an acceptance upon that evidence.' What this scintilla is, needs to be stated a little more definitely; otherwise it may be understood to include all cases where, on a motion for a new trial, a verdict would be set aside, as against the weight of the evidence. It would be impossible to draw a line theoretically, because evidence in its very nature varies from the weakest

How. 393), to prove the averments of the declaration, it is the duty of the court to give such peremptory instruction. But if there be some evidence tending to support the averment, its value must be submitted to the jury with proper instructions from the court. If this were not so, the court might usurp the decision of facts altogether, and make the verdict but an echo of their opinions. * * *

There was some evidence that the drain constructed by defendant was not carried out sufficiently to discharge its contents so as to be swept off by the tides; but that it caused an accumulation of matter at the outer end of the plaintiff's wharves, insomuch that vessels could not approach them with the same depth of water as formerly. If this be so, it was an injury to the plaintiff, for which he was entitled to recover damages.

This question should have been submitted to the jury, and this instruction given, as requested by plaintiff's counsel. The others are disposed of by the opinion of this court in Boston v. Lecraw.

For these reasons the judgment is reversed, and *venire de novo* awarded.

PLEASANTS v. FANT.

22 Wallace, 116. [*U. S. Sup. 1874.*]

Error to the Circuit Court for the District of Maryland.

R. & H. Pleasants sued Fant in the court below, and the single question in dispute was whether the defendant was a partner in the firm of Keene & Co., so as to charge him with a debt conceded

to the strongest, by imperceptible degrees. But the practical line of distinction is, that if the evidence is such that the Court would set aside any number of verdicts rendered upon it, *toties quoties*, then the cause should be taken from the jury, by instructing them to find a verdict for the defendant. On the other hand, if the evidence is such that, though one or two verdicts rendered upon it would be set aside on motion, yet a second or third verdict would be suffered to stand, the cause should not be taken from the jury, but should be submitted to them under instructions. This rule throws upon the Court a duty which may sometimes be very delicate; but it seems to be the only practicable rule which the nature of the case admits."

As to the difference between directing a verdict and setting one aside, see McDonald v. Ry., 167 N. Y. 66.

to be due by that firm to the plaintiffs, arising out of some transactions in cotton. The case was tried before a jury, and when the testimony was through, both plaintiffs and defendant prayed instructions of the court, which were all refused, and the court said to the jury:

"There is no evidence in this cause from which the jury can find that the defendant had such an interest in the purchase and sale of the cotton by Keene & Co. as will make him, the defendant, a partner as to third persons, and the jury will, therefore, find their verdict for defendant."

The bills of exception disclosed the testimony on which this instruction was founded, and the question now before this court was whether the verdict founded on that instruction should be set aside and the judgment reversed.

The direct testimony offered to prove the partnership was confined to the statements of Fant in a conversation with one of the plaintiffs and a clerk in their office, and the deposition of Keene, a partner of Keene & Co. The substance of the former was that Fant denied that he was a partner, said he knew from some experience what was necessary to make him a partner, and admitted that he had procured for Keene a loan of $10,000 in gold from a bank of which he was president, and that he was to receive part of the profits of Keene's venture in purchasing cotton with that money, as compensation for procuring the loan. What portion of the profits he was to receive was not stated.

Keene in his deposition denied that Fant was a partner in the transaction, but said that Fant had negotiated for him the loan from the bank, and he had made Fant a promise, which was entirely voluntary, to give him a part of the profits he might realize, and that he had mentioned no particular part or proportion of the profits to be so given.

After the admission of this testimony, the plaintiffs, on the ground that they had sufficiently shown a relation between Fant and Keene to admit of Keene's declaration to third persons as to Fant's interest, offered to prove by one of the plaintiffs that Keene had told him Fant was a partner, and asked that the plaintiffs would advance money enough on the cotton then in their possession as brokers to enable him to pay Fant his money and let him out of the firm. This offer was objected to and the objection sustained by the court.

A large amount of testimony, however, was admitted, the

object of which was to show that Fant, as president of the bank, was in the habit of using the money of the bank in private speculations, without the knowledge of the directors, but which was very feeble and far from establishing that fact.

Verdict and judgment having been given for the defendant, the plaintiffs brought the case here.

Mr. Justice MILLER delivered the opinion of the court.

If the admission of Fant to plaintiffs, and the evidence of Keene, are insufficient to raise a *prima facie* presumption of partnership, then Keene's declarations on that subject were inadmissible, and the court was right in its instruction to the jury. If it was sufficient for that purpose then it was erroneous, and the evidence here offered of Keene's statements to plaintiffs was improperly excluded.

The case rests after all on the question whether in Fant's declaration to the plaintiffs and Keene's deposition there was evidence of a partnership on which a verdict for plaintiff could have been sustained.

We have been favored by counsel with a reference, very learned and very exhaustive, to the authorities on the question of how far or when a participation in the profits subjects a party to the liability of a partner to third persons. And it must be confessed that some of the discriminations, where profits are used as compensation for definite services, are very nice.

We do not think that a close examination into these is necessary in this case. According to Keene's testimony there was clearly no contract binding him to divide the profits with Fant. He says the promise was entirely voluntary, and that no portion of the profits was mentioned. By voluntary he undoubtedly means that it was not a part of the agreement by which he obtained the money, but a gratuitous promise to reward his friendship if he succeeded in his venture.

Fant's statement to the plaintiff, as detailed by the latter, differs but very little from this. As a compensation for obtaining the loan, he says that Keene agreed to allow him a part of the profits, but how much or what proportion, or whether it was a definite sum to be paid out of the profits, or a proportionate part of the profits, is not shown.

If one of the most approved criteria of the existence of the partnership in such cases be applied to this, namely, the right to compel an account of profits in equity, the evidence totally

fails. In a suit for that purpose, founded on this precise statement, no chancellor would hesitate to dismiss the bill.

But we are pressed with the proposition that it was for the jury to decide this question, because the testimony received and offered had some tendency to establish a participation in the profits, and the question of liability under such circumstances should have been submitted to them, with such declarations of what constitutes a partnership as would enable them to decide correctly.

No doubt there are decisions to be found which go a long way to hold that if there is the slightest tendency in any part of the evidence to support plaintiff's case it must be submitted to the jury, and in the present case, if the court had so submitted it, with proper instructions, it would be difficult to say that it would have been an error of which the defendant could have complained here.

But, as was said by this court in the case of the Improvement Company v. Munson, 14 Wallace, 448, recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.

The English cases there cited fully sustain the proposition, and the decisions of this court have generally been to the same effect.

In the case of Parks v. Ross, 11 Howard, 362, this court held that the practice of granting an instruction like the present had superseded the ancient practice of demurrer to evidence, and that it answered the same purpose and should be tested by the same rules; and in that case it said the question for the consideration of the court was whether the evidence submitted was sufficient to authorize the jury in finding the contract set up by plaintiff. And in Schuchardt v. Allens, 1 Wallace, 359, this case is referred to as establishing the doctrine that if the evidence be not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly.

In the case of Pawling v. The United States, 4 Cranch, 219, the court, by MARSHALL, C. J., said: "The general doctrine on a demurrer to evidence has been correctly stated at the bar. The

party demurring admits the truth of the testimony to which he demurs, and also those conclusions of fact which a jury may fairly draw from that testimony. Forced and violent inferences he does not admit, but the testimony is to be taken most strongly against him, and such conclusions as a jury might justifiably draw the court ought to draw."

It is the duty of a court in its relation to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in these issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law.

In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor, that is the business of the jury, but conceding to all the evidence offered the greatest probative force which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside and grant a new trial. Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be, that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury. In such case the party can submit to a nonsuit and try his case again if he can strengthen it, except where the local law forbids a nonsuit at that stage of the trial, or if he has done his best he must abide the judgment of the court, subject to a right of review, whether he has made such a case as ought to be submitted to the jury; such a case as a jury might justifiably find for him a verdict.

Tested by these principles we are of opinion the Circuit Court ruled well. If plaintiffs had secured a verdict on the testimony before us we think that court ought to have set it aside as not being warranted by the evidence.[1] It is not possible with any just regard to the principles of law as to partnership, and the rules of evidence as applied to this testimony, to come fairly and reasonably to the conclusion that Fant was Keene's partner in this transaction.

Judgment affirmed.

PHILLIPS v. PHILLIPS.

93 Iowa, 615. [*1895.*]

KINNE, J. * * *

III. The material question in this case is as to the ruling of the court instructing the jury to return a verdict for proponent. While exception is taken to the court's ruling in withdrawing the issue of undue influence from the jury, we do not understand that appellants now seriously question the correctness of

[1] Scholfield, J., in Bartelott v. International Bank, 119 Ill. 259: * * * "Third—We said in Frazer v. Howe, *supra* (106 Ill. 573)—and that ruling has been since approved in Simmons v. Chicago and Tomah Railroad Co., 110 Ill. 340, and other cases,—that the function of the judge on such a motion 'is limited strictly to determining whether there is or is not evidence legally tending to prove the fact affirmed,—i. e., evidence from which, if credited, it may reasonably be inferred, in legal contemplation, the fact affirmed exists, laying entirely out of view the effect of all modifying or countervailing evidence.' * * *

"Since it was not intended in this case to overrule Simmons v. Chicago and Tomah Railroad Co., *supra*, it is apparent that 'evidence tending to prove,' means more than a mere scintilla of evidence, but evidence upon which the jury could, without acting unreasonably in the eye of the law, decide in favor of the plaintiff, or the party producing it. It is not intended by this practice that the function of the jury to pass upon questions of fact is to be invaded, any more than it is intended that such function is to be invaded by a motion to set aside a verdict, and for a new trial, upon the ground of the want of evidence to sustain the verdict. In neither case is the Court authorized to weigh the evidence and decide where the preponderance is. Hilliard on New Trials, p. 339, sec. 9, *et seq.*; Johnson v. Moulton, 1 Scam. 532; Lowry v. Orr, 1 Gilm. 70; Morgan v. Emerson, 20 Ill. 343."

the action of the court in that respect. However that may be, there is no question in our minds that the court was justified in holding that no evidence had been introduced warranting the submission of that question to the jury. As to the ruling of the court directing a verdict for proponents, upon the issue of want of mental capacity, we think the court erred in its judgment. At the conclusion of the evidence on part of the contestants the court, in effect, held that a case had been made requiring the submission to the jury of the question as to whether the testator at the time he made his will was possessed of sufficient mental capacity to execute a valid will. That holding was undoubtedly correct. The testimony of Squire Paxton, who had known deceased many years, and who drew the will, if it is to be believed, showed that the testator was not competent to make a will; that in fact he was almost, if not entirely, unconscious when his hand was guided to make his mark to the will. No effort was made to impeach Paxton generally. It is true an attempt was made, which was only partially successful, to show that he had testified differently on a former trial. The case then was in this condition: The court had held at the conclusion of contestants' main case, and before proponent entered upon his case, that contestants had made a case to be submitted to a jury. Proponent then introduced evidence tending to show that deceased was capable of making a will. Under these circumstances, the court, in directing a verdict, in effect put himself in the place of the jury, and weighed the evidence, and passed upon the credibility of the several witnesses. If, as the court properly held, the contestants when they closed their evidence in chief had overcome the burden which the law cast upon them, and had in addition thereto made a *prima facie* case requiring the submission of the issue of mental capacity to the jury, it does not matter what evidence was thereafter introduced—the case was for the jury. In other words, while the trial court may determine as to whether the contestants had given evidence sufficient to support a verdict, if one should be returned in their favor, it cannot, under the rule announced in Meyer v. Houck, 85 Iowa, 319, 52 N. W. Rep. 235, pass upon the question as to whether the preponderating weight of all of the evidence is in favor of or against the contestants; that is a question always for the jury. So it is for the jury to determine as to the weight of the evidence, though there be one witness testifying on one side to

certain facts, and many witnesses on the other side testifying to a contrary state of facts. It is not the province, in such a case, of the court to pass upon the credibility of the several witnesses, and say which one told the truth, or that the story of one is more likely to be correct than that of another. The rule laid down in the Meyer Case does not justify any such contention, nor can it be extended as is sought to be done by appellee in this case. To do so would be equivalent to doing away with jury trials. In this case it is apparent that the court's mind was changed as a result of the consideration of evidence which was introduced after he had deliberately determined that contestants had made a case for a jury; this was evidence introduced by the proponent. He was then weighing the evidence, passing upon the credibility of the witnesses, and, as we have said, this he cannot do. The record in this case is such that a trial court might well have refused to disturb a verdict of a jury, if rendered for either party. Though he might, if sitting as a juror, have been satisfied that the evidence preponderated in favor of the proponent, still that would not warrant him in putting himself in place of the jury, and passing upon the weight of the evidence and the credibility of the witnesses—matters as to which the jury are the sole judges. For the error pointed out the judgment is reversed.[1]

SOWELL v. CHAMPION.

6 Adolphus & Ellis, 407. [*B. R. 1837.*]

Lord DENMAN, C. J., now delivered the judgment of the court.

This case turns upon the question, whether the defendant Champion, being the bailiff for executing process within an inferior jurisdiction, was directed by the other two defendants, being the attorneys who sued out the process, to make a levy in the plaintiff's house, which was proved to be out of the jurisdiction. The rule was granted on a doubt whether there was any evidence of such specific direction.

[1] See also, Baumann v. Hamburg-American Packet Co., 67 N. J. L. 250; McDonald v. Street Ry. Co., 167 N. Y. 66.

All the defendants pleaded not guilty; and, secondly, a justification, under the judgment and *fi. fa.*, averring the plaintiff's house to be within the jurisdiction. The plaintiff contented himself at first with proving the goods seized, and that they were taken by the defendant Champion, under a precept handed to him by the defendants Tresidder and White. At the close of this case the counsel for Tresidder and White applied to the learned judge to direct their acquittal, which, we think, he properly refused. The ground for the application was the alleged absence of any evidence against them to make them co-trespassers; but this ground, if true in fact, would by itself have been wholly insufficient to warrant it. The application to a judge, in the course of a cause, to direct a verdict for one or more of several defendants in trespass is strictly to his discretion; and that discretion is to be regulated, not merely by the fact that at the close of the plaintiff's case no evidence appears to affect them, but by the probabilities whether any such will arise before the whole evidence in the cause closes. This is so palpable a failure of justice, when the evidence for the defense discloses a case against a defendant already prematurely acquitted, that such acquittal ought never to take place, but where there is the strongest reason to believe that such a consequence cannot follow. In the present case, we think that if, in truth, there had been nothing for the jury to consider, as against these two defendants, the judge would have exercised a sound discretion in refusing to direct their acquittal when the application was made; but we are of opinion that, until the judgment was put in, and they appeared to be acting as attorneys in the execution of a judgment, they could be considered only as directing a seizure of the plaintiff's goods without any authority; and although the direction was, in terms, to seize within one jurisdiction, and the seizure was, in fact, made in another, yet it was open for the jury, as against wrong doers, to consider, upon the evidence, whether they did not direct the seizure to be made in that place in which they certainly knew that it would take place.

The defendants then attempted to establish their justification, but failed; they proved, however, a judgment against the plaintiff, and an execution regular in all respects, except that the plaintiff's house was not within the jurisdiction. In the course of this evidence, however, it clearly appeared that the two attorneys had merely handed the precept to the bailiff to be executed;

and it was now contended that they were not liable to an action of trespass, if he acted beyond the bounds of his franchise, which it was his duty to know, and not theirs. The plaintiff not disputing this general proposition, contended that the attorneys had, in effect, taken upon themselves to order the bailiff to enter the plaintiff's house. The circumstances relied upon to prove this proposition were that, all these persons living near together and being acquainted, and the plaintiff having notoriously no other house than this, and no goods but what were in this, the bailiff must have understood the attorneys, when he received the precept from them, to intend that he should make the seizure in that identical house; and, further, that one of the attorneys sent a message to the plaintiff to inform him that Champion was about to be absent a short time, and would not levy on that day. The special pleas, pleaded by all the defendants, were also strongly urged, as showing that they all avowed and justified the fact of levying at the plaintiff's house; Tresidder and White thus adopting the act of Champion, as, indeed, they might fearlessly do, if they believed their own plea that the house was within the jurisdiction.

Upon consideration these grounds appear to us all insufficient.

1. The attorney, who places a writ for execution in the hands of an officer, does a lawful act, though he may be fully persuaded that the officer will be likely to execute it in some particular place which may turn out, upon inquiry, to be out of his jurisdiction. The attorney's opinion upon such a point is immaterial, unless he induces the officer to act upon it. He is not bound to form any; the officer must, at his peril, act where he has the power. We think that the circumstances of the case go no further than to show that, when the attorney gave the precept, he thought it would be executed at the plaintiff's house, without directing or authorizing it.

2. If it could be pressed even to the extent of implying that the attorney knew the bailiff intended to do so, we cannot say that is any evidence of his giving such authority. The bailiff may have told him his intention, and the attorney may have either thought him right, or not thought about the matter. That the bailiff's intention originated with some act or word of the attorney is not at all evidenced by the knowledge now supposed. If, indeed, the bailiff had communicated his intention, with respect to a house that the attorney knew to be out of the

jurisdiction, his acquiescence in an act he must have known to be illegal might possibly have made him a joint trespasser. But every thing here makes it impossible to doubt the attorney's *bona fide* belief that the house was within the jurisdiction.

3. Furthermore, the plaintiff argues the co-operation of all the defendants in the unlawful entry of the plaintiff's house from the special pleas. He contends that, if the attorney gave no special directions to the bailiff, he would have rested on the general issue, and not have defended himself by asserting the lawfulness of the act, as done within the jurisdiction. The introduction, however, of a special plea on the record can furnish no evidence in answer to the general issue. A defendant, by adducing evidence on a second plea, may strengthen against himself a case already made on the first; but he makes no such case by the mere averments or admissions in such plea.

Upon the whole, therefore, we think that, at the close of the case, as the two defendants Tresidder and White would have been entitled, if sued without Champion, to a nonsuit, they were entitled to a positive direction from the judge to the jury that they ought to find a verdict in their favor; and that he was mistaken in leaving it at all as an open question for their consideration. It follows that, as these defendants are to have the same benefit now as if the judge had given that strong direction, and a verdict had passed in their favor, a verdict of not guilty ought now to be entered for them.

Rule absolute.[1]

[1] And so in McCormack v. Standard Oil Co., 60 N. J. L. 243. A failure of proof by the party having the burden may, of course, be supplied by evidence introduced by the adverse party, or by a co-defendant. Philips, C., in State v. Anderson, 81 Mo. 78: "The State introduced one witness, Henry Smith, who testified, in substance, that in the month of September, 1880, he bought some whisky of the defendant, who kept a drug store in Roscoe, in said county. He paid him for it, and had no prescription therefor, from any physician. Nor was any prescription demanded or given by defendant. He only asked for the whisky and got it. The State, thereupon rested, and the defendant asked an instruction in the nature of a demurrer to the evidence, which the Court refused. This instruction, we think, should have been given. The evidence did not show that the whisky thus sold was less than one gallon. The evidence was, that the witness 'bought some whisky.' Whether more or less than one gallon did not appear. The burden rested on the State to show that the quantity was less than one gallon. Section 5472, Revised Statutes. But the defendant having afterward, in

ARTZ v. CHICAGO, R. I. & P. R. RY. CO.

34 Iowa, 153. [*1871.*]

Action to recover for personal injuries to the plaintiff, caused by a collision of defendant's engine and train of cars with the plaintiff's wagon, in which he was riding, at a highway and railroad crossing. The plaintiff, in his petition, alleged his own care, the defendant's negligence, and the resulting injury. The defendant, by answer, denied the plaintiff's allegations specifically. There was a jury trial, with verdict and judgment for $5,000 for plaintiff. The defendant appeals. The facts are stated in detail in the opinion.

COLE, J. * * * There are various questions made by the appellant's counsel, upon the instructions given and refused. We deem it unnecessary to examine them, for the reason that, in our judgment, the case must be finally determined upon the plain and undisputed facts of the case. The testimony shows, without conflict, and upon this the counsel do not differ, that the railroad and highway are very nearly upon a level, and run substantially parallel for a considerable distance, and are in plain view of each other; that, for the distance of at least six hundred and sixty feet before the plaintiff reached the crossing, he could have an unobstructed view of the railroad and the trains upon it, for at least ten hundred and ten feet, and this distance of view would increase as he approached the crossing; that the plaintiff was familiar with the locality, and the train was about on time, and with the head-light burning. This being true, we hold, as a matter of law, that the plaintiff cannot recover—since his own negligence must have directly contributed to the injury.

But, it is urged by the appellee's counsel that the plaintiff testifies that he did both look and listen to see and hear the train, but did not; and that this testimony shows that he was not guilty of contributory negligence, or, at the very least, it made that a question of fact for the jury. The difficulty, how-

his own testimony, supplied the defect, he is not now entitled to a reversal for the error of the Court in refusing his demurrer to the evidence. Kelley v. H. & St. Joe R. R., 75 Mo. 141."

And so in Ry. v. Carey, 115 Ill. 115.

See also, Bopp v. N. Y. Elec. Co., 177 N. Y. 33, where the proof was introduced by a co-defendant.

ever, with the position is that the conceded or undisputed facts being true, this testimony cannot, in the very nature of things, be also true. It constitutes, therefore, no conflict. Suppose the fact is conceded that the sun was shining bright and clear at a specified time, and a witness, having good eyes, should testify that at the time he looked and did not see it shine. Could this testimony be true? The witness may have been told that it was necessary to prove in the case that he did look and did not see the sun shine; he may have thought of it with a desire that it should have been so; he may have made himself first believe it was so, and this belief may have ripened into a conviction of its verity, and, possibly, he even may testify to it in the self-consciousness of integrity. But, after all, in the very nature of things, it cannot be true, and hence cannot, in the law, form any basis for a conflict upon which to rest a verdict. A man may possibly think he sees an object, which has no existence in fact, but which it may be difficult, if not impossible, to prove did not exist or was not seen. But an object and power of sight being conceded, the one may not negative the other.

In this case the plaintiff had good eyes; the train was approaching him in the night, with the engine's head-light burning brightly; if the plaintiff looked, he must have seen it, or he must have looked very negligently and carelessly—in either case, he was necessarily, in the eyes of the law, guilty of contributory negligence, precluding his right to recover. * * *

Reversed.[1]

FLETCHER v. LONDON & N. W. RY. CO.

L. R. [*1892.*] *1 Q. B. D. 122.*

Motion by the plaintiff for a new trial.

The action was for damages for personal injuries alleged to have been caused through the negligence of the defendants' servants.

[1] Accord: Payne v. Ry., 136 Mo. 562; Stafford v. Ry., 110 Wis. 331.

At the trial, WRIGHT, J., after hearing the opening of the plaintiff's counsel, stating the case which he expected to prove, nonsuited the plaintiff without the consent of his counsel, and in spite of his insisting that he ought to be allowed to call his witnesses.

Lord ESCHER, M. R. I am of opinion that the learned judge struck too soon. I will state the proposition in its broadest form. In my opinion a judge has no right, without the consent of the plaintiff's counsel, to nonsuit the plaintiff upon his counsel's opening statement of the facts. The opening of counsel may be incorrect in consequence of his having had wrong instructions. Owing to some accident, even with the greatest care, the evidence of the witnesses when they are called may differ from that which has been opened by counsel. It is for that very reason that a right of reply in given to the plaintiff's counsel, and in recent times a right to sum up the evidence has been given to the plaintiff's counsel, and the defendant's respectively, after his witnesses have been called. The experience of judges and of practitioners shows that the evidence often turns out to be somewhat different from that which appears in the instructions given to counsel. Therefore I state this proposition in its full extent—a judge has no right to nonsuit a plaintiff upon his counsel's opening without the consent of the counsel. That is what the learned judge has done in the present case. There was no assent on the part of the plaintiff's counsel. On the contrary, the plaintiff's counsel insisted upon his right to have the plaintiff's witnesses called, but, notwithstanding this, the learned judge persisted in nonsuiting the plaintiff on his counsel's opening. I think he was wrong in so doing, and the case must go down for trial.

KAY, L. J. I will not venture to say a word about any technicalities of practice which arise in this case. That which leads me to concur in the judgment of the other members of the court is this—I am simply startled at the notion that a suitor may lose his cause because his counsel in his opening happens by some accident to have omitted to state, or to have misstated, some fact which, if proved, and the case had gone to the jury, might have so influenced them as to induce them to decide in the suitor's favor. That this should be part of the practice of English courts of justice would be to me a very surprising thing indeed. I agree that the case ought to be tried.

Lord ESHER, M. R. The application in this court must be

allowed with costs. The costs of the trial will abide the result of the next trial.

Order for new trial accordingly.[1]

OSCANYAN v. ARMS CO.

130 U. S. 261. [*1880.*]

Mr. Justice FIELD delivered the opinion of the court.

This is an action to recover the sum of $136,000, alleged to be due to the plaintiff upon a contract with the defendant, as commissions on the sales of fire-arms to the Turkish government, effected through his influence. The defendant pleads the general issue. At the time the transactions occurred, out of which this action has arisen, the plaintiff was consul-general of the Ottoman government at the port of New York. The defendant is a corporation, created under the laws of Connecticut. The action was originally commenced in the Supreme Court of New York, and on motion of the defendant, was removed to the Circuit Court of the United States. When it was called for trial, and the jury was impaneled, one of the plaintiff's counsel, as preliminary to the introduction of testimony, stated to the court and jury the issues in the case, and the facts which they proposed to prove. From such statement it appeared that the sales for which commissions were claimed by the plaintiff were made whilst he was an officer of the Turkish government, and through the influence which he exerted upon its agent sent to this country to examine and report in regard to the purchase of arms. The particulars of the services rendered will be more fully mentioned hereafter. It is sufficient now to say that the defendant, considering that the facts which the plaintiff proposed to prove showed that the contract was void as being corrupt in itself and prohibited by morality and public policy, upon which no recovery could be had, moved the court to direct the jury to render a verdict in its favor. The court thereupon inquired of the plaintiff's counsel if they claimed or admitted that the statements which had been made were true, to which they replied in the affirmative. Argument was then had upon the

[1] Accord: Pietch v. Pietch, 245 Ill. 454; but see Spicer v. Bonker, 45 Mich. 630.

motion, after which the court directed the jury to find a verdict for the defendant, which was accordingly done. Judgment being entered upon it, the case was brought to this court for review. The reversal of the judgment is sought for alleged errors of the court below in three particulars:

1st. In directing a verdict for the defendant upon the opening statement of the plaintiff's counsel;

2d. In holding that the question of the illegality of the contract could be considered in the case, the same not having been specially pleaded; and,

3d. In adjudging that the contract set forth in the opening statement was illegal and void.

Each of these grounds will be carefully examined.

1. Several reasons are presented against the power of the court to direct a verdict upon the statement of the facts which the plaintiff proposed to prove, that might be more properly urged against its exercise in particular cases. The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced. The question in either case must be whether the facts upon which it is called to instruct the jury be clearly established. If a doubt exists as to the statement of counsel, the court will withhold its direction, as where the evidence is conflicting, and leave the matter to the determination of the jury.

In the trial of a cause the admissions of counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. They may limit the demand made or the set-off claimed. Indeed, any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof. And if in the progress of a trial, either by such admission or proof, a fact is developed which must necessarily put an end to the action, the court may, upon its own motion, or that of counsel, act upon it and close the case. If, on a trial for a homicide, to take an illustration suggested by counsel, it should appear from the opening statement that the accused had been pardoned for the offense charged, it would be a waste of time to listen to the evidence of his original criminality; for if established he would still be entitled to his discharge by force of the pardon. So in a civil action, if it should appear from the opening statement that it is

brought to obtain compensation for acts which the law denounces as corrupt and immoral, or declares to be criminal, such as attempts to bribe a public officer, or to evade the revenue laws, or to embezzle the public funds, the court would not hesitate to close the case without delay. Of course, in all such proceedings nothing should be taken, without full consideration, against the party making the statement or admission. He should be allowed to explain and qualify it, so far as the truth will permit; but if, with such explanation and qualification, it should clearly appear that there could be no recovery, the court should not hesitate to so declare and give such direction as will dispose of the action.

Here there were no unguarded expressions used, nor any ambiguous statements made. The opening counsel was fully apprised of all the facts out of which his client's claim originated, and seldom was a case opened with greater fullness of detail. He dwelt upon and reiterated the statement of the fact which constituted the ground of the court's action in directing a verdict for the defendant, namely, that it was Oscanyan's influence alone which controled the agent of the Turkish government; and for the use of that influence the defendant had agreed to give the compensation demanded—that is to say, that whilst an officer of the Turkish government the plaintiff had stipulated for a commission on contracts obtained from it through his personal influence over its agent. Had the case been pending in a court of some of the States, or in an English court, a nonsuit would have been ordered, if the facts stated had been deemed fatal to the action. Involuntary nonsuits not being allowed in the Federal Courts, the course adopted was the proper proceeding. The difference in the two modes is rather a matter of form than of substance, except in the case of a nonsuit a new action may be brought, whereas in the case of a verdict the action is ended, unless a new trial be granted either upon motion or upon appeal.

The language of this court in numerous cases is in accordance with these views, though used with reference to directing a verdict after evidence is received. But, as already stated, it cannot make any difference as to the power of the court, whether the facts be developed by the evidence or be admitted by counsel.[1] * * *

[1] Compare Redding v. Puget Sound Iron Co., 36 Wash. 642.

Indeed, there can be, at this day, no serious doubt that the court may at any time direct a verdict when the facts are undisputed, and that the jury should follow such direction. The maxim that questions of fact are to be submitted to the jury, and not to be determined by the court, is not violated by this proceeding any more than by a nonsuit in a State Court where the plaintiff fails to make out his case. The intervention of the jury is required only where some question of fact is controverted.

Our conclusion, therefore, is that the first position of the plaintiff is not well taken.

The suggestion in the argument, that the counsel who made the opening had been called into the case only two days before the trial, and was not, therefore, fully prepared to open it, does not merit consideration. In the first place, the record does not show that any application was made to the court for a postponement of the trial on that ground; in the second place, two days ought to have been ample time for the counsel to acquaint himself with the essential facts of the case; and in the third place, no new fact is even now mentioned that would have materially changed his statement.

2. The position of the plaintiff that the illegality of the contract in suit cannot be noticed, because not affirmatively pleaded, does not strike us as having much weight. We should hardly deem it worthy of serious consideration had it not been earnestly pressed upon our attention by learned counsel. The theory upon which the action proceeds is that the plaintiff has a contract, valid in law, for certain services. Whatever shows the invalidity of the contract, shows that in fact no such contract as alleged ever existed. The general denial under the Code of Procedure of New York, or the general issue at common law, is, therefore, sustained by proof of the invalidity of the transaction which is designated in the complaint or declaration as a contract.

Whilst, however, at the common law, under the general issue in assumpsit, it was always admissible to give in evidence any matter which showed that the plaintiff never had a valid cause of action, in practice many other matters were allowed under that plea, such as went to the discharge of the original cause of action, and showed that none subsisted at the commencement of the suit—such as payment, release, accord and satisfaction, and a former recovery, and excuses for non-performance of the con-

tract; and also that it had become impossible or illegal to perform it. 1 Chitty, Pleading, 493; Craig v. The State of Missouri, 4 Pet. 410-426; Edson v. Weston, 7 Cow. (N. Y.) 278; Young v. Rummell, 2 Hill (N. Y.), 478. It followed that there were many surprises at the trial by defenses which the plaintiff was not prepared to meet. The English courts, under the authority of an act of Parliament passed in the reign of William IV, adopted rules which, to some extent, corrected the evils arising from his practice of allowing defenses under the general issue which did not go directly to the validity of the original cause of action. And the Code of Procedure of New York did away entirely with the practice in that State, and required parties relying upon anything which, admitting the original existence of the cause of action, went to show its discharge—such as a release or payment, or other matter—to plead it specially, in order that the plaintiff might be apprised of the grounds of defense to the action. We do not understand that the code makes any other change in the matters admissible under the general denial.

But if we are mistaken in this view of the system of procedure adopted in New York, and of the defenses admissible according to it under a general denial in an action upon a contract, our conclusion would not be changed in the present case. Here the action is upon a contract which, according to the view of the judge who tried the case, was a corrupt one, forbidden by morality and public policy. We shall hereafter examine into the correctness of this view. Assuming for the present that it was a sound one, the objection to a recovery could not be obviated or waived by any system of pleading, or even by the express stipulation of the parties. It was one which the court itself was bound to raise in the interest of the due administration of justice. The court will not listen to claims founded upon services rendered in violation of common decency, public morality, or the law. History furnishes instances of robbery, arson, and other crimes committed for hire. If, after receiving a pardon, or suffering the punishment imposed upon him, the culprit should sue the instigator of the crime for the promised reward—if we may suppose that audacity could go so far—the court would not hesitate a moment in dismissing his case and sending him from its presence, whatever might be the character of the defense. It would not be restrained by defects of pleading, nor, indeed, could it be by

the defendant's waiver, if we may suppose that in such a matter it would be offered. What is so obvious in a case of such aggravated criminality as the one supposed, is equally true in all cases where the services for which compensation is claimed are forbidden by law, or condemned by public decency or morality. * * *

[On the third point, the court held the contract illegal.]

Judgment affirmed.

WALLNER v. CHICAGO TRACTION CO.

245 Illinois, 148. [*1910.*]

Mr. Justice DUNN delivered the opinion of the court:

The defendant in error, while a passenger upon a street car of the Chicago Consolidated Traction Company, the plaintiff in error, was injured by a collision with a train of the Chicago, Milwaukee and St. Paul Railroad Company. He sued both corporations in an action on the case. The plaintiff in error appeared and filed the general issue. The railroad company did not appear, and the cause, on the motion of the defendant in error, was discontinued as to it. On a trial the defendant in error recovered a judgment against the plaintiff in error, which the Appellate Court affirmed. The only question presented on this appeal is whether there was an accord and satisfaction between the defendant in error and the railroad company, which was charged as a joint tort feasor with the plaintiff in error.

The only evidence on the question of an accord and satisfaction was the following testimony of the defendant in error himself:

Q. "You have received from the railroad company a thousand dollars on account of this accident, haven't you?"

A. "I believe so."

Q. "On account of your injury?"

A. "Yes, sir."

Q. "So you don't have any claims against it now?"

A. "No, sir. * * * I made this arrangement—got the money from the St. Paul road—about October of last year."

Q. "They were sued jointly with the street car company in this case? When you started the suit you started it against both of them?"

Mr. Condon: "When I started it?"

A. "Yes, sir."

Mr. Bailey: "When your lawyer started it; yes, that is the better way to put it."

A. "Yes, sir."

There is no doubt that a release of one of several joint *tort feasors* releases all and that an accord and satisfaction by one joint *tort feasor* has the same effect as to all. (City of Chicago v. Babcock, 143 Ill. 358; West Chicago Street Railroad Co. v. Piper, 165 id. 325.) It is equally certain that payment and acceptance of a sum of money in satisfaction of an unliquidated demand is a good accord and satisfaction. (Ennis v. Pullman Palace Car Co., 165 Ill. 161.) The evidence here is meager but it is uncontradicted. After bringing suit against both corporations jointly, the defendant in error received of the railroad company $1,000 on account of his injury and dismissed his suit as to it, having no further claim against it. This evidence indicates that the payment of $1,000 was received in satisfaction of the liability of the railroad company, which was thereby relieved of all further liability on account of the injury. If the facts of the payment and acceptance of this sum, the dismissal of the suit against the railroad company, and the statement of the defendant in error that he had no further claim against it, are capable of another construction, the burden of furnishing the explanation or qualification which would give them a different effect was upon the defendant in error.

The question of accord and satisfaction was raised by motions made at the close of the plaintiff's evidence and at the close of all the evidence to direct a verdict for the defendant. It is insisted on behalf of the defendant in error that these motions did not preserve the question for review because they were general and did not set forth the grounds upon which they were made.[1] The only grounds upon which such a motion can be made are that the declaration does not state a cause of action, or that the evidence, with all reasonable inferences to be drawn therefrom, taken most strongly against the maker of the motion, does not fairly tend to support a verdict for the plaintiff; and it is not necessary to set out in such motion the particular defect of proof

[1] See note to West Chicago Street Ry. Co. v. Foster, 175 Ill. 396, *post* p. 359.

claimed to exist. The party making the motion may rely upon the failure of proof in any respect necessary to sustain a verdict. The question presented by such a motion is not necessarily, as insisted upon by defendant in error, whether the evidence tends to support the allegations of the declaration, but is whether there is evidence legally tending to sustain a verdict against the party making the motion. (Wolf v. Chicago Sign Printing Co., 233 Ill. 501.) The question therefore depends upon the character of the issue. Where evidence of an affirmative defense is offered, as in this case, it is proper to direct a verdict for the defendant, even though all the averments of the declaration are proved, if the evidence of the affirmative defense is not contradicted or explained.[2]

It is contended in behalf of defendant in error that the use of the words "on account of," in connection with the payment, indicates a partial payment rather than a full settlement. The fact that the effect of the payment was to extinguish the claim of the defendant in error answers this position. A payment "on account of the accident" means a payment because of the accident, and may be either on account or in full settlement. The defendant in error stated that he had no claim, and the legitimate inference is that the payment was a full settlement. No explanation of the language being offered, it must be given its ordinary meaning.

It is insisted that the defense arising out of the release of a

[2] The same rule is applied to the defense of contributory negligence made out by the plaintiff's evidence, whether on direct or cross-examination. Ry. v. Houston, 95 U. S. 697; Schofield v. Ry., 114 U. S. 615; Elliott v. Ry., 150 U. S. 245; Ry. v. Fruman, 174 U. S. 379; Hudson v. Ry., 101 Mo. 13; Fleming v. Ry., 49 Cal. 253; Donaldson v. Ry., 21 Minn. 293; Hooper v. Ry., 72 Kan. 422; Exp. Co. v. Nichols, 33 N. J. L. 434.

The English cases on this point are in some confusion. In Dublin, etc. Ry. v. Slattery, 3 Appeal Cases (H. of L.) 1155, it was assumed that the burden was on the defendant to prove contributory negligence, and this is given in one of the opinions as a reason for refusing to direct a verdict. On the whole, that case appears to have gone on the ground that there was room for a fair difference of opinion. See comments by Lord Justice Bowen in Davey v. London & S. W. Ry., L. R. 12 Q. B. D. (C. A.) 70. In Wright v. Midland Ry. Co., 51 L. T. R. 539 (Q. B. D. 1884), it was held that a verdict should have been directed for the defendant on the ground of contributory negligence shown by the plaintiff's evidence, but it was assumed that the burden was on the plaintiff to show the defendant solely to blame.

joint *tort feasor* was not made or argued in the trial court on the motion to direct the verdict. On this question we can look only to the record. Such defense was within the scope of the motion. The defendant had a right to rely upon it, and we must presume that it did so in the absence of a showing in the bill of exceptions to the contrary.

It is further insisted that it does not appear that the plaintiff in error and the railroad company were joint *tort feasors,* and that the payment of money by one who is not, in fact, a joint *tort feasor,* and his release, does not discharge others who may be liable. Without deciding the correctness of this legal proposition, it is sufficient to say that the declaration charges the plaintiff in error and the railroad company as joint *tort feasors;* that the uncontradicted evidence shows that at the time of the collision the railroad company was running its train at a speed in excess of that allowed by the ordinance of the city, and that the street car was backing off of the crossing when it was struck.

It is contended that the plaintiff in error having requested instructions, which were given, submitting to the jury, as a question of fact, whether the defendant in error received $1,000 from the railroad company in settlement of its liability, and stating that if defendant was found guilty only such amount should be allowed plaintiff in the assessment of damages as, together with what he had already received from the railroad company, would compensate him for his injury, thereby conceded that the evidence was subject to more than one interpretation, and cannot now insist that it is subject only to the one interpretation which required a verdict in its favor, but is bound by the theory of the case indicated by these instructions. These instructions were not requested by the plaintiff in error until after the adverse decision of its motion to direct a verdict. The court having refused, on this motion, to adopt the theory of the plaintiff in error, it was not obliged to abandon its defense on penalty of waiving its right to question, on appeal, this decision of the court. If it proceeded further it must do so according to the court's view of the law, and did not thereby waive its right to question that view in the Appellate Court through its exception taken to the decision of its motion. North Chicago Electric Railway Co. v. Pewser, 190 Ill. 67; Illinois Central Railroad Co. v. Swift, 213 id. 307; Chicago Terminal Railroad Co. v. Schiavone, 216 id. 275.

The judgment of the Appellate Court and of the Circuit Court will be reversed and the cause remanded to the latter court for a new trial.

Reversed and remanded.

VICKERS, C. J., and CARTER, J., dissenting.

HOPKINSON v. LEEDS.

78 Pennsylvania St. 396. [*1875.*]

Mr. Justice WILLIAMS delivered the opinion of the court, October 18th, 1875.

This was an action of debt, for an escape of the plaintiff's debtor, after his arrest by the sheriff upon a writ of *capias ad satisfaciendum*. On the trial, a judgment of non-suit was entered against the plaintiffs, and the court *in banc* refused to set it aside. If there was no sufficient evidence to maintain the action, the judgment of non-suit was rightly entered; otherwise the case should have been submitted to the jury with the proper instructions. It appeared from the debtor's own testimony that he was permitted by the sheriff's deputies, upon presenting himself at the sheriff's office every morning, to go at large until the next day from the time of his arrest until he gave bond for his discharge under the insolvent laws, and that for this indulgence he and his nephew paid them the sum of seventy dollars. This was clearly a permissive escape, for which the defendant was answerable. It is true that under the act of 14th of February, 1729-30, section 14, 1 Sm. Laws 186, the sheriff was not bound to commit the prisoner to jail immediately upon his arrest, but it was his duty to keep him in safe and strict custody, and if he allowed him to go at large for the shortest time, either before or after the return day of the writ, without the consent of the plaintiffs, it was an escape for which he was liable. It is no answer to the escape that the prisoner voluntarily returned and surrendered himself to the custody of the sheriff, or that he was subsequently discharged under the insolvent laws. But it is insisted that he was allowed to go at large after his arrest, with the consent of the plaintiff's attorney. Undoubtedly the attorney had authority to consent to his discharge from the arrest, and if he did, the

sheriff is not responsible for an escape. But to warrant the judgment of non-suit, the evidence of such consent should be clear, direct and positive, and a part of the plaintiff's case. The only evidence tending to show the alleged consent, is the testimony of the sheriff's clerk, who was called by the plaintiffs to prove the time the writ came to the sheriff's hands. On his cross-examination, under exception by the plaintiffs, he said: "After the writ had been in our hands a day or two, I had a conversation with Mr. Hart (the plaintiff's attorney) on the subject. I asked Mr. Hart in the vestibule, between our office and the register's, what we should do with Mr. Cooper; whether we should send him to prison or not. Cooper was then in the sheriff's office in custody. He said there was no necessity of that, but if the deputy would press him, he or his friends would find the money or pay the money." It cannot be pretended that there is anything in this language showing an express consent by Mr. Hart that the prisoner might go at large; and if not, is there anything from which such permission may be fairly implied? If he said there was no necessity of sending Cooper to prison, in answer to the inquiry of the sheriff's clerk, does it follow that he intended to consent to his discharge from the arrest? If so, why did he say in the same breath, and as a part of his answer, that if the deputy would press him he or his friends would find or pay the money? How could the deputy "press him" if he was allowed to go at large? But whether he could or not, it is clear that the proper meaning and interpretation of the language was a question for the jury, and not a matter of law for the court. Besides, the evidence shows that the prisoner was permitted to go at large before the conversation took place, and if so, the subsequent assent of the plaintiff's attorney to his being and remaining at large, even if it had been expressly given, would not release the defendant from his liability to the plaintiffs in this action: Scott v. Seiler, 5 Watts 235. But the testimony as to the conversation was no part of the plaintiff's case, and it was improperly admitted in evidence on the cross-examination of the plaintiff's witness. The rule is well settled that the cross-examination should be confined to matters in regard to which the witness has been examined in chief, and to such questions as may tend to show the bias and interest of the witness.[1] To permit the defend-

[1] For the English and the Federal rules on the scope of the cross-examination, see Wigmore's Evidence, sec. 1890.

ant, under the guise of a cross-examination, to give evidence in chief is not only disorderly, but unfair to the plaintiffs. Here the defendant was allowed, on the cross-examination of the plaintiffs' witness, to give evidence upon which he relied to defeat the action, before the plaintiffs had given any evidence tending to show that the prisoner had been permitted to escape after his arrest. Doubtless the defendant had a right to ask the witness on his cross-examination what instructions were given by the plaintiffs' attorney at the time the writ of *ca. sa.* was placed in his hands, for if any instructions were given, they were part of the *res gestæ;* but he had no right to examine him in regard to conversations which he had with the plaintiffs' attorney after the debtor's arrest under the *ca. sa.,* for they were no part of the matters in regard to which he was examined in chief. But whether they were proper subjects of cross-examination or not, the judgment of non-suit was clearly erroneous.

Judgment reversed and a procedendo awarded.

DAVIS v. HARDY.

6 Barnwall & Cresswell, 225. [*1827.*]

This was an action against the defendant for maliciously, and without any reasonable or probable cause, indicting the plaintiff for embezzlement at the July sessions for the county of Somerset, 1825. Plea, not guilty. * * * [The evidence of one Stainer, introduced by the defendant, was relied on to show probable cause.]

The counsel for the plaintiff then insisted that it ought to be left to the jury to find whether they believed Stainer's evidence. The learned judge said that there was no contradictory evidence as to the fact of Davis having desired Stainer to conceal from Hardy that the chaise hire had not been paid, and he refused to leave any question to the jury, and nonsuited the plaintiff. A rule *nisi* for setting aside the nonsuit had been obtained in last Easter term, upon the ground that it ought to have been left to the jury to decide whether they believed Stainer's evidence or not.

ABBOTT, C. J. I think that the nonsuit in this case was proper and that the rule for setting it aside must be discharged. The

question for our consideration is not whether Davis was guilty of the charge preferred against him, nor whether the indictment was preferred from an improper motive; but the question is, whether Hardy, the prosecutor, had a reasonable or probable cause for preferring the charge against Davis, and I am of opinion, upon the evidence given at the trial, that there was probable cause for his making that charge. The facts are these: Davis hired the chaise in the name of Hardy and received from the assignee of the bankrupt the amount of the chaise hire; he did not pay it to the innkeeper who let the chaise, nor to Hardy, in whose name it was hired, nor did he ever mention to the latter that he had received the amount. Upon a charge being preferred against him, he was examined before the magistrates, and one of the magistrates was called as a witness on the part of the plaintiff, and proved that he admitted most of the facts above stated. That being the case upon the part of the plaintiff, the learned judge was of opinion that there was sufficient *prima facie* evidence of the want of probable cause for preferring the indictment, and he refused to nonsuit the plaintiff. Stainer, the innkeeper, who was the proprietor of the chaise, was then called as a witness on the part of the defendant. He proved that the chaise hire was not paid to him; that he applied to Davis twice for it, and that upon his threatening that unless he was paid he would tell Mr. Hardy, Davis requested him not to tell Mr. Hardy that it was not paid, as it would do him a great injury. Now, if that fact, which was proved by Stainer, had been proved in the course of the plaintiff's case, there can be no doubt that it would have been evidence of a probable cause for preferring the charge; but it is said that it ought to have been submitted to the jury as a question of fact, whether Davis ever did request Stainer not to inform Hardy that he, Davis, had received the money. But where a witness is unimpeached in his general character, and uncontradicted by testimony on the other side, and there is no want of probability in the facts which he relates, I think that a judge is not bound to leave his credit to the jury, but to consider the facts he states as proved, and to act upon them accordingly. I think, therefore, that the judge was well warranted in coming to the conclusion in this case, that there was a probable cause for preferring the indictment, and this rule must therefore be discharged.

BAYLEY, J. I think that in this case there was sufficient evi-

dence of probable cause, and such evidence, too, as a jury ought to be directed to proceed upon. If there is nothing in the demeanor of a witness, or in the story he tells, to impeach his credit, and he is not contradicted by testimony on the other side, it is not a case for a jury to deliberate upon.[1] If the case had been submitted to the jury, and they had disbelieved this witness, I think that we should have been bound to send the case down to a new trial.

Rule discharged.

MERCHANTS' BANK v. HAVERHILL IRON WORKS.

159 Massachusetts, 158. [*1893.*]

MORTON, J. There was evidence tending to show that the note was put into circulation fraudulently by the Potter-Lovell Company, which received it from the defendants. The plaintiff was bound to show, therefore, that it took the note in good faith and for value before maturity. Emerson v. Burns, 114 Mass. 348. Sullivan v. Langley, 120 Mass. 437. The president and cashier of the plaintiff bank testified that such was the fact. The defendants introduced no testimony to contradict those officers, but claimed the right to go to the jury on the question whether the plaintiff took the note for value and without notice of the fraud. The court, however, ruled, as matter of law, that the plaintiff was entitled to recover and directed a verdict for the plaintiff. We think this was error. The jury may have disbelieved the president and cashier, or have believed them only in part, and may have been satisfied on all the evidence that they either had notice or did not take the note for value before maturity. They were not bound, as matter of law, to believe the president and cashier, though their testimony was uncontradicted. Twombly v. Monroe, 136 Mass. 464.

There was nothing in the charter of the Potter-Lovell Company which expressly or by implication forbade the company to purchase the note in suit. It was fairly incident to the conduct of a brokerage business that it should at times purchase or dis-

[1] See Koehler v. Adler, 78 N. Y. 287, *post* 368.

count notes. If, therefore, the plaintiff's president was bound to know, as matter of law, the powers conferred upon the Potter-Lovell Company by its charter, the admission of his statement that he did not know them could have done the defendants no harm.

Because of the error in taking the case from the jury the

Exceptions are sustained.

FULBRIGHT v. PERRY COUNTY.

145 Missouri, 432. [*1898.*]

BURGESS, J. This is a suit to set aside the will of John F. Fulbright, late of Perry county, Missouri. The suit was begun in the Circuit Court of said county, but by agreement of all parties the venue was subsequently changed to the Circuit Court of Cape Girardeau county, where the case was tried at the August term, 1895.

For grounds for setting aside the will the petition alleges that for a long time prior thereto and at the time the said supposed will was subscribed by the said John Fulbright, and also at the time the same was published and declared as and for his last will and testament, the said John Fulbright was not of sound and disposing mind, but on the contrary was of unsound mind, and wholly incapable of making a testamentary disposition of his property. The petition then prays that the probate of said supposed will may be revoked and set aside, and that said instrument be declared inoperative and for naught held.

The answer of defendants denies that the testator was insane or of unsound mind at the time of the execution of the will in contest, and alleges that he was of sound and disposing mind at that time. That he died on the fifth day of October, 1894, and that his will was duly admitted to probate by the Probate Court of the county of Perry, in this state, on the fifteenth day of October, 1894, and prays that the said last will and testament be declared and established as the last will and testament of said John Fulbright.

A trial was had on the issues thus joined, and after the close of all the evidence the jury, in pursuance of an instruction of the

court, returned a verdict for defendants. Plaintiffs appealed.
* * *

The only question for consideration is as to whether or not there was sufficient evidence of the insanity of the testator, and want of capacity to make a will, to take the case to the jury.

When the formal execution of a will according to the requirements of the statute is shown, as was done in this case, and the subscribing witnesses testify to the sanity of the testator, and he is of proper age to make a will, a *prima facie* case in favor of the proponents of the will is made out, and it then rests upon the contestants to overcome this *prima facie* case by substantial evidence. Carl v. Gabel, 120 Mo. 283; McFadin v. Catron, 138 Mo. 197.

In Benoist v. Murrin *et al.*, 58 Mo. 307, it was said: "A disposing mind and memory may be said to be one which is capable of presenting to the testator all his property, and all the persons who come reasonably within the range of his bounty, and if a person has sufficient understanding and intelligence to understand his ordinary business, and to understand what disposition he is making of his property, then he has sufficient capacity to make a will. Harvey v. Sullens, 46 Mo. 147. In McClintock v. Curd, 32 Mo. 411, the most satisfactory test was declared to be whether the mind and memory of the testator were sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed the will. The Supreme Court of Vermont in the case of Converse v. Converse, 21 Vt. 168, lays down the doctrine that if the deceased was, at the time, capable of understanding the nature of the business and the elements of the will, that is, the nature and extent of his property and the persons to whom he meant to convey it, and the mode of distribution, it is sufficient; and in Horne v. Horne, 9 Ired. 99, it is said, it is sufficient if the testator knew what he was doing and to whom he was giving his property."

Measured by the rule thus announced, had John Fulbright mental capacity to make a will? Considering the testimony most strongly in favor of the contestants, the claim that John Fulbright was of unsound mind, and had not sufficient capacity to make a will when he executed the instrument in controversy, is based upon certain peculiarities and eccentricities heretofore stated, and others of a similar character, and these are not enough to satisfy the unprejudiced mind that he had not sufficient mental

capacity to make a will.[1] They may all have existed and still be consistent with his sanity at the time of the execution of the instrument.

In Chafin Will case, 32 Wis. 557, it was held that mental peculiarities and eccentricities of character and conduct of the testator very much like those of the testator in the case at bar were not sufficient evidence of testamentary incapacity to invalidate the will.

If there was any substantial evidence that the testator was not of disposing mind and memory as hereinbefore defined at the time of the execution of the will, then the case should have gone to the jury, but no such evidence was adduced. Mere peculiarities and eccentricities of character of the testator were not inconsistent with his sanity.

Upon the other hand, it was shown by the attesting witnesses to the will that he was sane, and there was no substantial evidence to the contrary. He always attended to his own business affairs, and from all that appears did it as well as anybody could have done. For many years he lived the life of a recluse, aloof from his relations and all others, and it is not strange under the circumstances that he should have given his property to the county in which he had lived for so many years. There was no substantial evidence, we think, that John Fulbright was insane or that he did not have mental capacity sufficient to execute the will. * * *

(b) *The Motion or Request.*

BASS v. RUBLEE.

76 Vermont, 395. [*1904.*]

WATSON, J. The declaration is special assumpsit in three counts severally declaring on a written contract dated Febru-

[1] Opinion evidence founded on mere eccentricities is not sufficient to take the case to the jury. Winn v. Grier, 217 Mo. 420. See also, Martin v. Bawdern, 158 Mo. 379, where the verdict was directed for the proponents of the will on the issue of due execution.

When the question of capacity goes to the jury, the proponent has the burden of satisfying them that the testator had sufficient capacity. Norton v. Paxton, 110 Mo. 456.

ary 13, 1901, sealed and subscribed by the plaintiff and the defendant, whereby the defendant promised and agreed to furnish to the plaintiff in the cars at East Berkshire, in the month of June, 1901, certain specified lots of maple lumber, to be paid for by the plaintiff as therein stipulated. It is further alleged that subsequently the parties by mutual agreement not under seal extended the time for the delivery of the lumber without setting a time limit therefor, and that in pursuance of the contract so modified as to time, thereafter, between the dates in the several counts alleged, the defendant delivered to the plaintiff a portion of the lumber specified in the agreement, and received payment therefor. Then follow allegations of the defendant's breach of the contract in neglecting and refusing, though requested, to deliver the balance of the lumber, etc.

At the close of plaintiff's opening evidence, the defendant moved for a verdict on the grounds that (1) there was no evidence of any agreement between the parties to extend the terms of the contract beyond its original stipulation; and (2) there was no evidence of such an extension as is set up in the writ. The motion was granted *pro forma,* to which the plaintiff excepted.

The record shows that the plaintiff testified, in effect, that the defendant could not get the lumber out in June, the time specified in the original contract; that in June they mutually agreed that, since the lumber could not be ready to ship until in the fall, the time should be extended till fall; and that then they would survey and ship the lumber when it was ready. The subsequent correspondence between the parties and their actions regarding the lumber tended to show the same thing. Since there was evidence to go to the jury on the question whether the original contract was modified as claimed by the plaintiff, it was error to order a verdict.

If the second ground stated in the motion could be considered as covering a variance, if any there be, between the time for the performance of the modified contract as alleged, and that which the evidence tends to show, we do not so consider it, for it appears from the record that it was not treated by the defendant in the court below, and it is not so treated in his brief here.

It is urged by the plaintiff that if it was error to direct a verdict, he is entitled to final judgment in his favor in this court. Hereon it is argued that the motion for a verdict was equivalent

to a demurrer to the evidence, and is governed by the same rules, referring to Latremouille v. Bennington & Rutland Ry. Co., 63 Vt. 336, 22 Atl. 656. There, in discussing the defendant's motion for a verdict, made at the close of the evidence, it is said that "such a motion is like a demurrer to the whole evidence, on the ground of its insufficiency to warrant a verdict for the plaintiff if one should be found.[1] The motion could not be entertained, if, as the case stood, there was any evidence tending fairly and reasonably to support the claim of the plaintiff. If the verdict was to be determined by an inference to be made by the jury from facts, any of which were more or less in dispute, the disputed fact or facts were to be determined and the inference made by the jury. So long as any fact from which such inference is to be made is in doubt or dispute, the inference is depend-

[1] Scholfield, J., in Bartelott v. International Bank, 119 Ill. 259, "* * * First—Although we have said that motions to exclude the entire evidence from the jury, and motions to instruct the jury to find for the defendant, are in the nature of demurrers to evidence, yet this relates rather to the mode of viewing the evidence, than to the time or mode of interposing such motions. They are in the nature of demurrers to evidence, in that they admit not only all that the testimony of the plaintiff proves, but also all that it tends to prove. (Frazer v. Howe, *et al.*, 106 Ill. 573.) But none of the technical particularity is required in making such motions, that is required in demurrers to evidence, and no judgment is rendered against the defendant on disallowing the motion. They are usually informal, and most frequently made by simply presenting to the Court an instruction, to be given or refused, instructing the jury that the evidence is excluded, or that they should find for the defendant, or, it may be, both. It would certainly be proper, and, where the motion can rightly be sustained, most convenient, to present the motion at the conclusion of the plaintiff's evidence, so as to at once terminate the trial; but we know of no reason or authority why it may not be made after evidence is heard on behalf of the defendant. At most, so far as is now perceived, delaying the motion until after the introduction of defendant's evidence could only affect the question of costs incident to the examination of the defendant's witnesses,—and this, obviously, would appeal only to the discretion of the Court, on a motion to re-tax costs, as, in case of the examination of unnecessary witnesses. In the following cases the practice seems to have been to entertain the motion after hearing the evidence of the defendant. Reed v. Inhabitants, 8 Allen, 524; Improvement and Railroad Co. v. Munson, 14 Wall. 342; Randall v. Baltimore and Ohio Railroad Co., 109 U. S. 478; Herbert v. Butler, 97 id. 318. And that practice is recommended by this Court in City of Mattoon v. Fallin, 113 Ill. 249."

And so in Eberstadt v. State, 92 Tex. 94. See also, Baylis v. Ins. Co., 113 U. S. 316.

ent partly upon the fact to be determined by the jury. It is not wholly a question of law.

A motion for a verdict is considered in law as in the nature of a demurrer to the evidence, and, to the extent in the Latremouille case indicated, that is, to the mode of viewing the evidence, it is governed by the same rules. But the required technicalities of the demurrer and the procedure incident thereto have no place when the court is moved to direct a verdict. The province of the court on such a motion is not to weigh the evidence and ascertain where the preponderance is, but it is limited strictly to determining whether there is, or is not, evidence from which, if believed, it may reasonably be inferred, in legal contemplation, that the fact affirmed exists, excluding the effect of all modifying or countervailing evidence; and on overruling the motion no judgment is rendered against the moving party. Bartelott v. International Bank, 119 Ill. 259.

In the case before us a modification of the original contract is essential to be shown to the maintenance of the action. The evidence bearing on that question consists of oral testimony, correspondence between the parties, and their actions covering a period of six months or more of time, together with inferences to be drawn from the circumstances disclosed by the evidence. A jury trial is most appropriate for the settlement of the facts involved, and the defendant should not be deprived of an opportunity therefor. While it is a long established rule of practice in cases brought into this court upon exceptions to finally dispose of the case here, it is a part of the same rule that, when a jury trial becomes necessary, or if the decision of this court places the case in such a state that either party has a right to a trial by jury, the cause will be remanded. Peach v. Mills, 13 Vt. 501; Porter v. Smith, 20 Vt. 344.

Nor could the result be different were the defendant's motion treated as a demurrer to the evidence, and determined by the law governing under that practice; for some of the technical requirements were not complied with. The object of such proceedings is not to bring before the court an investigation of facts in dispute, nor to consider and weigh the force of testimony, and the presumptions and inferences arising from the evidence. The only purpose of such a demurrer is to refer to the courts questions of law arising from the facts ascertained. Where the parol evidence is loose and indeterminate, which may be urged with

more or less effect to a jury; or if the evidence is of circumstances, and is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of the existence of other facts—the defendant cannot demur to the evidence and insist on the jury's being discharged from giving a verdict, and oblige the plaintiff to join in the demurrer, without distinctly admitting upon the record every fact and every conclusion which the plaintiff's evidence conduced to prove. This was not done. When the facts are not thus admitted upon the record, and there has been a voluntary joinder in demurrer, leaving the facts unsettled and indeterminate, it is deemed a sufficient reason for refusing judgment on the demurrer. Furthermore, there is no joinder of demurrer on the record, without which no final judgment can properly be rendered. With the case standing in this way, it is the settled practice to award a new trial on the ground that the issue between the parties, in effect, has not been tried. 2 Tidd's Pr. (3 Am. ed.) 865-866; Gibson v. Hunter, 2 H. Black. 187; Fowle v. The Common Council of Alexandria, 11 Wheat. 320, 6 L. ed. 484; Crowe v. People, 92 Ill. 231.

The pro forma judgment is reversed and cause remanded.

WEST CHICAGO STREET RY. CO. v. FOSTER.

175 Illinois, 396. [*1898.*]

Mr. Justice PHILLIPS delivered the opinion of the court.

Error is assigned by appellant on the refusal of the trial court to allow its motion,[1] made at the close of plaintiff's evidence, to take the case from the jury, which motion was renewed at the

[1] In Ames v. Strachurski, 145 Ill. 192, the following form of request was approved: "Now come the defendants, by their attorneys, and request the Court to instruct the jury that the evidence is insufficient to maintain the plaintiff's case, as charged in the declaration, and therefore the verdict must be for the defendants."

The motion need not be in writing. Swift v. Fue, 167 Ill. 443; Foley v. Ry., 64 Ia. 644; Ry. v. Rooney, 186 Fed. 16. In a number of the states a formal motion is not used. In many jurisdictions it is not necessary to specify the particular defect in the proof. Wallner v. Chicago Traction Co., 245 Ill. 148, *ante*, p. 344. In others the motion to direct a non-suit or verdict is required to state the particular ground, and nice distinctions are drawn between grounds and reasons. See

close of all the evidence. The record discloses that the motions were made as alleged, but neither of them was accompanied by an instruction. Such condition of the record presents no legal question for review in this court as to the refusal of the trial court to grant such motion. Where a motion is made at the close of plaintiff's evidence to take a case from the jury and direct a verdict for the defendant, and is renewed at the close of all the evidence, a written instruction[2]

Bassett v. Mayor, 118 Md. 114 (that under the pleadings and evidence plaintiff was not entitled to recover is too general); Gerding v. Haskin, 141 N. Y. 514 (general request sufficient if defect could not have been obviated).

Straup, J., in Smalley v. Ry., 34 Utah, 423: "A mere general statement that, under the evidence, the plaintiff is not entitled to recover, or that the defendant is entitled to a verdict, or that the plaintiff has not made a sufficient case to go to the jury, does not point to anything. If, however, in a case of negligence a specification is made that the evidence is insufficient to show negligence on the part of the defendant, or that under the evidence the plaintiff is conclusively shown to be guilty of contributory negligence, or that he assumed the risk, etc., such a specification is ordinarily sufficient. If a verdict is directed on the ground that the evidence is insufficient to show negligence on the part of the defendant, it sufficiently is made to appear on what question of law the case was taken from the jury. The making of such a specification ordinarily points out the defect within the meaning of the adjudicated cases."

Per Curiam, in Palmer v. Marysville Democrat, 90 Cal. 168: "This is an action to recover possession of a certain printing-press delivered by plaintiffs' assignors to one McWhorter, under a contract similar in terms to that which was under consideration in the case of Palmer v. Howard, 72 Cal. 293; 1 Am. St. Rep. 60.

When the plaintiffs rested at the trial, the defendant moved the court for a nonsuit, upon several grounds. The motion was granted, and the only question for consideration is, whether the court erred in its ruling.

McWhorter sold the property to Holland & Crane, and they had full notice of the terms and conditions under which the former had secured possession of it.

The agreement of June 27, 1887, was binding not only upon McWhorter, but upon subsequent purchasers with notice of the conditions under which McWhorter took and held the property.

Assuming that the plaintiffs were required to prove that the defendant took the property with notice of the facts, the grounds of the motion for a nonsuit do not specify a failure to prove such notice; and under the rule well established here, a nonsuit cannot be granted, unless the ground upon which it is supported was called to the attention of the court and the plaintiffs at the time the motion was made. None of the grounds stated in the statement on motion for a non suit is well taken.

Judgment and order reversed, and cause remanded for a new trial.

[2] See Ill. R. S. 1913, Chap. 110, § 73.

directing such verdict must be presented with the motion. When a written instruction is not so presented and error is assigned on the refusal of the court to give the instruction, this court has not before it any legal question for determination. (Calumet Electric Street Railway Co. v. Christenson, 170 Ill. 383; Swift & Co. v. Fue, 167 id. 443; Wenona Coal Co. v. Holmquist, 152 id. 581.) In this case defendant offered a general instruction with its series directing the jury to find for the defendant, but that was not sufficient to bring it within the rule above stated. Its right to assign error upon the refusal to give such instruction at that time was waived by offering it with other instructions.[3] (Pierce v. Walters, 164 Ill. 560; West Chicago Street Railroad Co. v. Yund, 169 id. 47; Gilbert v. Watts-DeGolyer Co. id. 129; Chicago and Northwestern Railway Co. v. Delaney, id. 581.) The motion, therefore, to take the case from the jury not being accompanied by an instruction so directing the jury, no discussion of the facts in the case is necessary. * * *

BOGK v. GASSERT.

149 U. S. 17. [*1893.*]

Mr. Justice BROWN, after stating the case, delivered the opinion of the court.

The action in this case was upon the lease of a city lot and

[3] Lamm, J., in Kenefick v. Fire Ins. Co., 205 Mo. 294: "But if in either of those cases that court intended to say that the bill of exceptions should show the order in which instructions were asked or refused, and that there is vital significance in such punctilio, then such ruling is of doubtful utility in arriving at ultimate justice. In strict logical order, if defendant contends there is no case to go to the jury, he should hand up his instruction in the nature of a demurrer first and at once at the close of the case, because, if that instruction be given there is no use of considering any other. But the practice is for both sides to hand their instructions up to the judge at one and the same time. Many trial judges require this to be done so that the court may have them all under his eye, may consider them by and large and pick and choose as his judicial acumen may fortify his sense of justice and prompt his action. We can see nothing material or vital in the mere order in which the instructions are asked or passed upon. They look alike whether viewed from a down to izzard, or, vice versa, from izzard up to a."

certain mining claims, and a judgment was demanded for the restitution of the premises, and for damages for detention. The answer set forth in substance that the lease was one of a series of contemporaneous agreements, consisting of two deeds, an agreement to reconvey and a lease; that the deeds were intended as a mortgage, and that the rental of $450 named in the lease was the amount which it was understood would be necessary to pay the taxes upon the property, and the annual assessment work upon the mining claims, and that upon payment thereof by defendant Bogk the object of the lease should be fully satisfied and discharged; that the defendant paid this sum, and that the said lease became void and of no binding force.

The trial took place before a jury, and the assignment of error relates to the rulings of the court made in the course of such trial. We proceed to consider them in their order.

1. That the court erred in overruling defendant's motion for a nonsuit. In this connection the bill of exceptions shows that the plaintiffs put in evidence the deeds from Bogk and wife to the plaintiffs, the agreement to reconvey the lease, with oral testimony of the rental value, and then rested. Defendant thereupon moved for a nonsuit upon the ground that plaintiffs had failed to prove that they were ever at any time in or entitled to the possession of the premises; that defendant ever entered into possession under or by virtue of said lease; and that plaintiffs totally failed to prove a demand to have been made for the possession of the premises, or ever served or gave notice to quit upon the defendant. This motion was overruled. Defendant excepted and proceeded to introduce testimony in defense.

The practice in Montana (Comp. Stat., § 242) permits a judgment of nonsuit to be entered "by the court, upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient case for the jury." Without going into the question whether the motion was properly made in this case, it is sufficient to say that defendant waived it by putting in his testimony.[1] A defendant has an undoubted right to stand upon

[1] In a number of the states error in refusing to direct a verdict at the close of the plaintiff's case is not waived by putting in evidence for the defense, but the defendant takes the chance of curing the defect. McPherson v. Ry., 97 Mo. 253.

As to the discretion of the Court in ruling on the motion before the close of all the evidence, see Sowell v. Champion, *ante*, 332.

his motion for a nonsuit, and have his writ of error if it be refused; but he has no right to insist upon his exception after having subsequently put in his testimony and made his case upon the merits, since the court and jury have the right to consider the whole case as made by the testimony. It not infrequently happens that the defendant himself, by his own evidence, supplies the missing link, and, if not, he may move to take the case from the jury upon the conclusion of the entire testimony. Grand Trunk Railway v. Cummings, 106 U. S. 700; Accident Insurance Co. v. Crandal, 120 U. S. 527; Northern Pacific Railroad v. Mares, 123 U. S. 710; Union Insurance Co. v. Smith, 124 U. S. 405, 425; Bradley v. Poole, 98 Mass. 169; Columbia & Puget Sound Railroad v. Hawthorne, 144 U. S. 202. * * *

KENEFICK v. NORWICH INS. CO.

205 Missouri, 294. [*1907.*]

LAMM, J. In the St. Louis Court of Appeals, BLAND, P. J., wrote, and, with the concurrence of his learned brethren on that bench, there was handed down in this case the following opinion (119 Mo. App. 308). * * *

"3. Plaintiffs further contend that the case was tried upon a theory adopted by the defendant and it is thereby estopped to raise an objection to the action of the court in overruling its demurrer to the evidence and submitting the issues to the jury. It is a well settled rule of practice in this state that where parties try a cause upon a certain theory, neither party can have the case considered on another and different theory in the Appellate Court. [Mirrielees v. Railroad, 163 Mo. 1, c. 486, and cases cited.] But where, as was done in this case, the defendant, at the close of all the evidence, offers a demurrer to the evidence as a whole, which the court refused to grant, and he saves his exceptions to the rulings of the court, the Appellate Court is required to review all the evidence heard on the trial and determine for itself whether or not there is substantial evidence in support of the verdict. [McPherson v. Railroad, 97 Mo. 253; Weber v. Railroad, 100 Mo. 194; Hilz v. Railroad, 101 Mo. 36; Jennings

v. Railroad, 112 Mo. 268; Kerr v. Cusenbary, 60 Mo. App. l. c. 560; Flinn v. Bldg. Assn., 93 Mo. App. 444.]" * * *

I. The proposition in the third paragraph is to the effect that where a defendant challenges plaintiff's theory of the sufficiency of all the evidence to make a case for plaintiff by submitting an instruction in the nature of a demurrer to the evidence at the close of the case, such defendant does not estop himself or waive his right on appeal to pursue his exception to the court's ruling on such demurrer by asking and receiving instructions the converse of those given for plaintiff. Is that proposition good law? Eminently so, because:

(a) In construing rules of appellate practice in accordance with right reason regard must be had to the difference between the position occupied by a defendant and that occupied by a plaintiff. The plaintiff goes into court voluntarily; the defendant is "lugged" in, that is, pulled in by the lugs, will ye, nill ye. The plaintiff goes up to battle on his own ground—he pitches the field. The defendant by a plea in avoidance may undertake to flank plaintiff's position and select another battlefield. The trial court may parry the flanking operation and force defendant to join battle on the position taken by plaintiff. Having been thus coerced and having yielded, as he was in duty bound to yield (and because he could not help himself) how can it be said that, because he made the very best of a bad bargain and tried "to pluck the flower, safety, from the nettle, danger," he lost his right to complain of the court's ruling in coercing him? * * *

But the reason of the rule ought not to permit its application to a case where the losing party, as here, does not invite the error, but yields under protest to the theory of the trial court, and thereafter tries, as best he may, to ameliorate his plight by administering an antidote to the poison already injected in the case, to see if, peradventure, he may not be able to render it innocuous.

The reasoning of the cases cited by BLAND, P. J., in paragraph three is in accord with that of the foregoing cases and sustains the proposition in that paragraph.

Indeed, it was a favorite notion of writers on sprightlier themes than the law, commencing, maybe, with Aristophanes and coming on down through a line of wits, including Butler, Scarron, and Goldsmith, that:

"For he who fights and runs away,
May live to fight another day;
But he who is in battle slain,
Can never rise and fight again."

Transmitting that notion into allowable law phrase, it might read thus: He who fights and runs away from a position taken on his answer and at the trial, because driven away by the court, may live to fight another day on appeal in the same position, if he marked the spot by an exception; but he who is in battle slain, that is, who selects his place voluntarily, and who legally (speaking in figure) dies in his tracks on his selected theory, can fight no more on appeal, because: (as once a mortgage, always a mortgage, so) once fairly dead, always dead.

(b) The rule respondent invokes is the sensible commonplace of the law that a case must be heard on appeal on the same theory it was tried below. That rule is constantly applied in many ways. But care must be exercised to put one's finger on the theory upon which the case was tried. What if there be two theories. May one be taken and the other left? If a plaintiff and defendant jointly select a theory and try their case on that theory, neither may stray from it on appeal. If either litigant tole the court into error, the one to blame may not complain. So, if plaintiff and defendant jointly tole the trial court into error, neither may complain of that error on appeal. But it must not be forgotten that a defendant, in his defense, may have a quiver full of arrows, may be allowed more than one theory—may have two strings to his bow withal. For instance, his first theory may be that he is not liable as a matter of law on all the facts. His next theory may be that it is a question of fact to be put to the jury whether, under the evidence, he is liable on the issues put to them on plaintiff's theory of the case. Precisely so is the record in this case. By answer, by its course at the trial and by the mandatory instruction asked and refused, defendant insisted it was not liable on the facts as a matter of law. The trial court refused to go hand in hand with defendant on that theory; and defendant, adjusting itself to the court's theory, is not now estopped to reassert its first theory and waived none of its legal rights on appeal.

BEUTTELL v. MAGONE.

157 U. S. 154. [*1895.*]

Mr. Justice WHITE, after stating the case,[1] delivered the opinion of the court.

The contention is advanced that as each party below requested the court to instruct the jury to return a verdict in his favor, this was equivalent to a stipulation waiving a jury and submitting the case to decision of the court. From this premise two conclusions are deduced; first, that, there being no written stipulation, the decision below cannot be reviewed upon writ of error;[2] second, that, even if the request in open court, made by both parties, be treated as a written stipulation, the correctness of the decision below cannot be examined, because it is in the form of a general finding on the whole case, and findings of the court upon the evidence are reviewable only when they are special.

The request, made to the court by each party, to instruct the jury to render a verdict in his favor, was not equivalent to a submission of the case to the court, without the intervention of a jury, within the intendment of Rev. Stat., sections 649, 700. As, however, both parties asked the court to instruct a verdict, both affirmed that there was no disputed question of fact[3] which could operate to deflect or control the question of law. This was necessarily a request that the court find the facts, and the parties are, therefore, concluded by the finding made by the court, upon

[1] The action was brought to recover back the duty paid under protest, on the ground that the articles should have been taxed as rugs and not as carpets.

[2] See Kearney v. Case, 12 Wall. 275, *post.*

[3] Allen J., in Winchell v. Hicks, 18 N. Y. 558, "But it is insisted that the judge should have submitted the facts to the jury; and that he erred in holding as matter of law that the payment was made by the request of the sureties. It may be answered to this position,

First, That the defendants assumed, in their motion for a nonsuit, that there was no dispute as to the facts, and that there was nothing, therefore, to be submitted to the jury.

Second, That no request was made by defendants' counsel to go to the jury. It is to be presumed that if the counsel had insisted upon submitting to the jury any of the questions of fact involved in the case, the court, if proper, would have complied with the request. At all events, it is too late to raise that point here, for the first time, under the general exception to the direction of the judge to the jury to find a verdict for the plaintiff."

which the resulting instruction of law was given.[4] The facts having been thus submitted to the court, we are limited, in reviewing its action, to the consideration of the correctness of the finding on the law, and must affirm if there be any evidence in support thereof. Lehnen v. Dickson, 148 U. S. 71; Runkle v. Burnham, 153 U. S. 216.

There was obviously no disputed question of fact. The plaintiff introduced proof tending to show that the rugs had been woven as rugs on a loom prepared for that purpose, and which was therefore not suitable for weaving carpeting; that they contained materials used in making rugs which were not the kind or quality of materials used in making carpets; that their size, shape, pattern, back, and other qualities made them distinctly rugs *eo nomine* as distinguished from rugs made "from portions of carpet or carpeting." From this evidence was deduced the conclusion of law that they were dutiable as rugs at 40 per cent *ad valorem*. Defendant's testimony tended to show that the rugs were called Wilton rugs, were a plush fabric (which was not traversed by the plaintiff's testimony), and hence were of a "like character and description" with Wilton carpet. Upon these facts the defendant based his claim that as matter of law they were dutiable at the rate imposed on such carpets. From

[4] Lumpkin, J., in Broadhurst v. Hill, 137 Ga. 833 (1912), "It was argued, that because the plaintiffs in error moved the court to direct a verdict in their favor, and the defendants in error also moved for the direction of a verdict in their favor, this waived the question of whether the case should be submitted to the jury, and that, upon overruling the motion of the plaintiffs in error, the court could grant that of the defendant in error. The motion for a new trial distinctly makes the point that, under the evidence, the motion for the defendants in error should not have been granted but the case should have been submitted to a jury. The mere fact that a party to a litigation contends that the evidence demands a finding in his favor does not amount to a concession that, if this position is not correct, a verdict may be directed in favor of the other party. On the contrary, a contention that the evidence demands a verdict for one party *prima facie* includes the contention that it does not demand a verdict in favor of the other. Of course parties may agree that the case is controlled by a question of law, and that the judge shall direct a verdict one way or the other, and thus waive the right to have a jury pass upon the facts. In Lydia Pinkham Co. v. Gibbs, 108 Ga. 138 (33 S. E. 945), something of this kind occurred; and moreover, the Supreme Court held that there was no conflicting evidence on the issue involved. In the present case there was no such waiver of a jury trial on the facts."

this undisputed evidence, then, arose the legal question whether rugs of the kind stated, not being "portions of carpet or carpeting," were taxable as Wilton carpets, because they were of like character or description, that is, because they were plush fabrics. Wilton carpets were also a plush fabric. The correctness of the ruling below depends upon an interpretation of the language of the statute which we quote: * * *

KOEHLER v. ADLER.

78 New York, 287. [*1879.*]

CHURCH, Ch. J. The action was for money loaned, and the verdict was directed by the court. The defendant alleges error in not submitting the case to the jury. At the close of the evidence the plaintiff asked the court to direct a verdict in his favor, and the defendant then requested a like direction in his favor. The court stated that he thought the plaintiff entitled to the direction. The counsel for defendant then asked to go to the jury upon the question whether the debt in suit was ever contracted at all. This was denied, and an exception taken. Upon these facts we think that the defendant was entitled to go to the jury if the case warranted it. If nothing further had been done after both parties asked a direction of a verdict it would be assumed that they intended to waive the right of submission to the jury, and consented that the court should decide the questions of law and fact involved. But after a request, and a refusal to direct a verdict, there is no absolute inconsistency in asking to submit questions of fact to the jury. It is not proper, ordinarily, to direct a verdict if there is any material question of fact which ought to be submitted, and it is error to make the direction in such a case. Parties may consent, however, that the court may pass upon all questions both of fact and law, and if they do they will be bound, and when both parties ask a direction this court will presume such consent. In this case the presumption is repelled by an express request to go to the jury upon a question of fact.[1] Besides the court did not put the denial to

[1] Accord: Minnahan v. Ry., 138 Fed. 37; Empire Cattle Co. v. Ry., 210 U. S. 1.

Where no request to submit questions to the jury is made, and the facts are thus constructively sub-

submit the question of fact to the jury upon the ground that the defendant's counsel had irrevocably waived the right, but it was denied presumably upon the ground claimed here that the cause of action was proved by uncontradicted evidence, and that there was no question to submit, and that point is now before us for adjudication.

The action was brought to recover $2,500 loaned by the plaintiff to defendant's intestate on the 30th of January, 1871, with interest, less $250 paid September 23d, 1874. The plaintiff produced a check made by himself, dated January 30, 1871, upon the Bullshead Bank, payable to the order of the defendant's intestate, and indorsed by him and another person. It is not claimed that this check is evidence of money loaned, but, on the contrary, the presumption is that it was paid upon some debt or obligation owing by the plaintiff. The evidence relied upon is the testimony of two witnesses as to certain acts and admissions of the intestate, which, if true, did establish a cause of action. One of them testified that, in September, 1871, he was present when the plaintiff and intestate were together, and the former produced the check and requested payment, and charged the defendant that he procured the money fraudulently; that the defendant admitted it, and "begged him not to prosecute him as he knew he could bring him to Sing Sing." This witness also testified that he was present on the 23d of September, 1874, when the intestate paid $250 on the check, and agreed to pay the balance in a few months. Another witness, the brother of plaintiff, testified that he was present when the $250 were paid, and corroborates the first witness as to the payment, but relates the conversation somewhat differently from the first witness. The plaintiff's counsel insists that this evidence being uncontradicted, could not as a matter of law be disregarded, and if there was nothing else in the case, this position would be correct.

It is a general rule that the positive testimony of an unimpeached, uncontradicted witness cannot be disregarded by the court, or jury, arbitrarily or capriciously (Lomer v. Meeker, 25 N. Y. 361), but in applying this rule great care should be exercised. In Elwood v. The Western Union Telegraph Co. (45

mitted to the court, the question as to whether there is any evidence to support the finding by the court is open to review. Ins. Co. v. Ry., 134 Fed. 794; Love v. Scatcherd, 146 Fed. 1; Michigan Co. v. Tabor, 141 Fed. 332; Melton v. Bank, 190 Fed. 127.

N. Y. 549), RAPALLO, J., in delivering the opinion of this court, said: "But this rule is subject to many qualifications. There may be such a degree of improbability in the statements themselves as to deprive them of credit, however positively made. * * * And furthermore, it is often a difficult question to decide when a witness is in a legal sense uncontradicted. He may be contradicted by circumstances as well as by statements of others contrary to his own. In such cases courts and juries are not bound to refrain from exercising their judgment, and to blindly adopt the statements of a witness for the simple reason that no other witness has denied them, and that the character of the witness is not impeached." The general rule was held not to apply in Kavanagh v. Wilson (70 N. Y. 177), where it was inferred that the witness might be interested in the recovery, and it appeared that the statement was not entirely free from improbability. It appeared in this case that on the 30th day of January, 1871, when the alleged loan was made, and for a considerable period prior and subsequent thereto, the plaintiff and decedent were trustees of a corporation known as the "Stonewall Oil Company," the decedent being president and the plaintiff treasurer; that the plaintiff received, and paid out upon checks, the funds of said company in his individual name; that while said parties occupied this position the plaintiff commenced an action against said company for a large sum claimed to be his due for advances made; that in the bill of particulars furnished in said action, which was an abstract from the cash book kept by the plaintiff of receipts and disbursements for the said corporation, an item appeared under date of January 30, 1871, of $2,500 paid to the decedent; that during the pendency of said action, and in the year 1873, an arrangement between the plaintiff and decedent was made, by which it was agreed that no evidence should be interposed on behalf of the company, and that plaintiff should be allowed to take judgment for the amount which the referee should report, and by which, in consideration of $5,000, secured to be paid, the decedent was released from any personal liability on account of said alleged indebtedness to the plaintiff, and the decedent assigned to the plaintiff all his interest in the property of the corporation. Mr. Boardman, counsel for the defendant in that action, and in this, testified that, after the release was given, he said to both parties: "This settles all the

matters between you, does it not?" and they both replied, "It does."

This claim was not mentioned at that time, nor at any time, until nearly three years after the intestate died, and a considerable period after the expiration of notice to creditors to produce their claims. In view of these, and some other circumstances, it cannot be affirmed as matter of law that the evidence of the two witnesses produced by the plaintiff was entirely undisputed and uncontradicted. No explanation was given of the item of $2,500 charged to the company on the same day of the alleged loan, and but one voucher was produced which might as well serve for that charge as the loan. It is not needful to determine how the fact was, but only that there were circumstances tending to show that the alleged load was in fact money advanced to the company. It may be that the evidence of these two witnesses ought to outweigh all the circumstances referred to. All that we intend to decide is that it was a question of fact for the jury, and not one of law for the court, and that the rule invoked is not applicable to the case. It follows that the judgment must be reversed and a new trial granted, costs to abide the event.

GERMAN SAVINGS BANK v. BATES.

111 Iowa, 432. [*1900.*]

GIVEN, J. * * * II. The only question presented in this case is whether the original note was satisfied by the execution and delivery of any or all of the renewal notes. If it was satisfied there was no extension of the time for its payment, and if it was not satisfied plaintiff could have sued upon it at any time after its maturity, and in that case there was no extension of time. If all or any of the renewal notes were received by the plaintiff in the place of, and in satisfaction of, the note in suit, then it was satisfied; but if the renewal notes were received under an agreement that they were not to stand in lieu of the first until indorsed as it was indorsed, and that the first was to be in force until that was done, then there was no satisfaction of the note in suit. The evidence is undisputed that such was the agreement when the first renewal was given, but, as we have seen, the matter of the

agreement was never afterwards mentioned, and it may well be questioned whether in giving and taking the later renewal notes the parties acted upon the agreement or whether they abandoned it. On the one hand we have the fact that the plaintiff continued to hold the note in suit without any indorsement of satisfaction thereon, as tending to show that it acted upon the agreement. On the other hand, we have the fact that it continued to receive these renewal notes to the number of nine or ten, and interest up to November 2, 1896, more than three years after the note in suit became due, without demanding payment or indorsement, as tending to show that both parties thereto abandoned said agreement, and that the credit, as evidenced by the renewal notes, was extended to the defendant company alone. The pivotal question in the case is whether the renewal notes were all given under said agreement, or whether in giving the later notes the agreement had been abandoned. There are other facts than those we have mentioned bearing upon the question. Though there is no conflict in the evidence, the conclusion to be drawn therefrom is one about which minds may differ. Therefore it cannot be said as a matter of law which is the correct conclusion. We think that question should have been submitted to the jury, and that the court erred in sustaining plaintiff's motion for a verdict.

III. At the close of all the evidence the defendant moved for a verdict, which motion was overruled; whereupon the plaintiff moved for a verdict, which was sustained. Plaintiff contends, as was contended in Bank v. Milling Co., 103 Iowa, 524, that, as each party moved for a verdict, each waived the right of submission to the jury. We said in that case: "This seems to be the rule established by the weight of authority"—citing 6 Enc. Pl. & Prac. 703. Holding that there was not sufficient evidence to justify the court in directing a verdict for the defendant, we expressed no opinion upon the question thus presented. The authority referred to is cited by the plaintiff, and is as follows: "Where, at the close of the evidence, on a jury trial, both parties ask for the direction of a verdict, it will be assumed that they intend to waive the right of submission to the jury, and let the court decide the question involved, both of law and fact, unless the party whose request is refused asks to go to the jury upon the questions of fact." A number of cases, mostly from New York, are cited in the footnotes as supporting this statement of the rule. This court has never passed upon the

question of application of this rule in our State, and we understand that the practice with us has been different. In Calder v. Crowley, 74 Wis. 157, wherein the question was raised, but not passed upon, the court said, "that it would be slow to hold that a party thereby waived his right to have the questions of fact passed upon by the jury," and we concur in that expression. Relying upon the law as announced in Meyer v. Houck, 85 Iowa, 319, as to when the court may direct a verdict, each party made his motion. By his motion the defendant asked for a verdict upon the claim that the evidence would not support a verdict for the plaintiff, and this the plaintiff denied. Plaintiff's attitude as against defendant's motion was that of insisting that there was evidence to support a verdict in his favor. After the court ruled with him, holding, not that plaintiff was entitled to a verdict, but that there was evidence to support such a verdict if the jury should so find, plaintiff moved for a verdict. The attitude of the defendant towards that motion was that there was not evidence to support a verdict for the plaintiff. The parties never agreed to waive a jury, and to submit the issue of fact to the court, and we think it should not be assumed that they so intended. They differ radically as to the proper conclusion to be arrived at from the evidence as to whether all the renewal notes were given under the agreement that the one in suit was to remain as evidence of the debt—a matter, as we have said, about which minds may differ. Neither was willing, as against the motion of the other, to waive a jury, and submit this difference to the court, but each was impliedly asking, as against the other, that this difference, which it was the province of the jury to determine, should be submitted to the jury.

Reversed.[1]

[1] Accord: Thompson v. Brennan, 104 Wis. 564; Stauf v. Bingenheimer, 94 Minn. 309; Lonier v. Bank, 153 Mich. 253; Wolf v. Chicago Printing Co., 233 Ill. 501; Virginia Hardware Co. v. Hoyes, 126 Tenn. 370 (1912).

Contra: Sutter v. Vanderveer, 122 N. Y. 652. The rule in the Federal Courts appears to be derived from the New York doctrine.

SECTION 5. NONSUITS.

(a) *When permitted or directed.*

2 Lilly Reg. 292-3.

A. There is a difference between a nonsuit and a retraxit; a nonsuit is always upon a demand made for the plaintiff to appear, and he makes a default; a retraxit is when the plaintiff is present in court. A retraxit is in bar of all other actions of the like nature, but a nonsuit is not, unless in some particular cases; for it may be the plaintiff hath mistaken something in his declaration, or that his witnesses who should prove his action are not present.

B. A nonsuit in an appeal of murder, rape, robbery, etc., after appearance is peremptory, and this is *in favorem vitae*. Co. Litt. 138, 139.

C. In real or mixed actions, the nonsuit of one of the demandants is not the nonsuit of both, for he which makes default shall be summoned and severed. But regularly in personal actions, the nonsuit of one plaintiff is the nonsuit of both, unless in some particulars. Ibid.

D. Upon a trial when the jury comes to deliver in their verdict, and the plaintiff is called to hear the verdict; if he do not appear after he is thrice called by the cryer of the court, he is to be nonsuited, and the nonsuit is to be recorded by the secondary, by the direction of the court, at the prayer of the defendant's counsel: Hill. 21 Car. B. R. For the court will not order it to be recorded, except the counsel pray it for the client.

F. The king cannot be nonsuited, because in judgment of law he is always present in court; but his attorney-general may enter a *nolle prosequi*.

* * * * * * * * * * * * * * *

K. When a plaintiff is nonsuit, if he will again proceed, in the same cause, he must put in a new declaration, and cannot proceed upon that declaration, whereupon he did proceed in the cause, and wherein he became nonsuit: 22 Car. B. R. 16, Apr. 1650. B. S. For by his being nonsuit it shall be intended that he had no such cause of suit as he declared in; and so that declaration is void, and he hath no day in court.

ARNOLD v. JOHNSON.

1 Strange, 267. [*Nisi Prius, 1720.*]

The cause was called, and the jury sworn, but no counsel, attorneys, parties or witnesses of either side appeared. Sergeant WHITAKER being asked his opinion, said the plaintiff ought to be called, for the jury being charged, the cause must be carried on to some determination. But the chief justice said, that nobody had a right to demand the plaintiff but the defendant,[1] and therefore the defendant not demanding him, he could not order him to be called, but the only way was to discharge the jury. And Mr. Ketelby remembered a case where my Lord Parker did so upon the like accident, Smith v. Whistler, Cas. Temp. Hard. 305, S. P.

CASTLE v. BULLARD.

23 Howard (U. S.), 172. [*1859.*]

CLIFFORD, J. * * *

As the facts have been found by the jury, the questions to be determined are those that arise upon the exceptions. Of these, the first in the order of the argument at the bar is the one founded upon the refusal of the court to order a nonsuit as to the defendant, Granger, as requested by the counsel at the close of the plaintiff's testimony.

Several answers may be given to this complaint, each of which is sufficient to show that the exception cannot be sustained. In

[1] Under modern statutes courts very generally have power to dismiss a case for failure to plead or otherwise prosecute the action, or for failure to comply with an order of the court. See Ill. R. S. 1913, Chap. 110, §§ 21, 32; Mo. R. S. 1909, § 2259. Buller, J., in Worley v. Lee, 2 Term Rep. 112 (1787): "By the general rules of law, a plaintiff must declare against a defendant within twelve months after the return of the writ; but, by the rules of this court, if he do not deliver his declaration within two terms, the defendant may sign judgment of *non pros.* Though, unless he take advantage of the plaintiff's neglect, the plaintiff may still deliver his declaration within the year. Therefore *Per Curiam*, rule discharged."

See comments in Holmes v. Ry., 94 Ill. 439.

the first place, Circuit Courts have no power to grant a peremptory nonsuit against the will of the plaintiff. It was expressly so held by this court in Elmore v. Grymes and al., 1 Pet. 471, and the same rule was also affirmed in DeWolf v. Rabaud and al., 1 Pet. 497. In the case last named the defendants at the trial, after the evidence for the plaintiff was closed, moved the court for a nonsuit, which was denied, and the defendant excepted, and sued out a writ of error; but this court held that the refusal to grant the motion constituted no ground for the reversal of the judgment, remarking, at the same time, that a nonsuit cannot be ordered in any case without the consent and acquiescence of the plaintiff.[1]

Repeated decisions have been made to the same effect; and as long ago as 1832 it was declared, as the opinion of this court, in Crane v. The Lessees of Morris, 6 Pet. 609, that this point was no longer open for controversy. See also Silsby v. Foote and al., 14 How. 222.

Another answer to this complaint arises from the fact that the motion for nonsuit is inappropriate in a case like the present, where there are other defendants to whom it cannot be applied. In actions of this description, where there is more than one defendant, the charge, beyond question, as a general rule, is joint and several, and consequently, one may be found guilty and another not guilty; but at common law there cannot regularly be a nonsuit as to one and a verdict as to others; and for that reason, whenever it appears that there is evidence in the case to charge one or more of the defendants, a nonsuit is never granted at common law, even in jurisdictions where the authority to grant the motion in a proper case is acknowledged to exist. Revett v. Brown, 2 M. & P. 18; Collier on Part. (Am. ed., 1848), § 809, p. 698.[2]

[1] By statute or local practice in a number of states, non suits are directed for failure of proof. See Bournonville v. Goodall, 10 Pa. St. 133; Bopp v. Electric Co., 177 N. Y. 33; Carroll v. Electric Co., 49 Or. 477. Where this practice obtains, the application raises the same questions as a motion to direct a verdict, Holmes v. Ry., 94 Ill. 439.

[2] In a proper case the plaintiff may dismiss as to one defendant and proceed against the others. Callaghan v. Myers, 89 Ill. 566. For a distinction between tort and contract cases in this respect, see Minor v. Bk., 1 Pet. (U. S.) 72.

ST. JOHN'S LODGE v. CALLENDER.

4 Iredell, 335. [*1844.*]

Upon the trial of an issue of *devisavit vel non,* the plaintiff propounded a paper writing as the last will and testament of Joseph Dean, and gave evidence tending to prove its execution. The charge was unfavorable to the proponent, who thereupon asked to enter a nonsuit, which was refused. The jury returned a verdict for defendants, and plaintiff appealed from the sentence pronounced thereon.[1]

RUFFIN, C. J. * * *

We are not sure that we understand what was meant by the appellants' asking leave to suffer a nonsuit, as the term is not appropriate to proceedings in a Court of Probate. But from analogy to actions at law we suppose the object was to withdraw from the court before a verdict was rendered on the issue, *devisavit vel non,* so as to prevent the delivery of a verdict, and leave the party at liberty to institute another proceeding of the same kind. If so, we think it inconsistent with a proceeding of this sort and contrary to the nature of the jurisdiction of the Court of Probate. The instrument propounded is always brought into court in the first instance, and the jurisdiction is *in rem.* The inquiry is whether the party deceased died testate, or intestate, and if the former, whether the script propounded be his will or a part of it, or not.

When once regularly raised, the court must pronounce on those questions, without reference to the presence of this or that person; for the sentence, until annulled, binds all the world. If a cause is about to be heard or under a hearing, and a party in interest is not furnished with full proof and has been surprised, his course is, for cause shown, to get an order for opening the case to farther proof and deferring the pronouncing of sentence. Though not in form, it is in substance not materially different upon an issue made up and tried in a court of law under our statute. It is analogous to the trial of an issue out of chancery—only, the one is at the instance of the chancellor to satisfy his conscience, and the other the law compels the Court of Probate to make up in every case of a disputed will. From the nature of an issue, he, who alleges the affirmative, opens the

[1] Statement has been condensed.

case, and for that reason the party propounding the will is commonly spoken of as the plaintiff. But it is inaccurate; for, properly speaking, there is neither plaintiff nor defendant, but both sides are equally actors in obedience to the order directing the issue. In neither case is the party in the affirmative at liberty to withdraw and defeat a trial more than the party in the negative. If injustice be done on the trial, the relief is to get that finding set aside by the court which ordered the issue, and have it tried again. We have not known of any other course. It is especially proper in the Court of Probate. After an allegation propounding a will has been received, until it has been decided, and the paper pronounced against, administration cannot be granted; for the jurisdiction to grant administration is only where there is an intestacy, and that is always declared before or at the granting of the letters of administration, and recited in them. Slade v. Washburn, 3 Ired. 557.

It would be most absurd to keep the question of intestacy ever open by allowing one, setting up a pretended will, to propound and repropound it, and at his pleasure to baffle the court and hinder sentence from being finally pronounced, by withdrawing from the court. It cannot be so. On the contrary, the paper itself, the *res* is *sub judice,* and the judge gives his sentence for or against it, without noticing particular persons. The court endeavors that all parties in interest shall have notice, that the instrument is *sub lite;* and, that done, the sentence binds persons having such notice as much as if they were parties acting in the proceedings. Redmond v. Collins, 4 Dev. 437. The object of the motion in this case could not, therefore, be effected; for if the party could be allowed to withdraw and had withdrawn from the cause, he could not have taken the instrument with him. It still remained in the custody of the law, and the court must have proceeded to sentence against it, which would have concluded this person as it would others, while the sentence remained in force, and, further, would "have concluded him, once acting in the cause," from repropounding the instrument. As the paper was only propounded by the devisee, as a will of real estate, our view is confirmed to the points arising out of the statute.

Per curiam. Sentence affirmed.[2]

[2] Accord: Benoist v. Murrin, 48 Mo. 48; but see Hitchcock v. Green, 235 Ill. 298.

MERCHANTS' BANK v. SCHULENBERG.

54 Michigan, 49. [*1884.*]

SHERWOOD, J. This case has once before been in this court (48 Mich. 102), but the questions then raised have no bearing upon the points made in the present record. The action is assumpsit upon a Canadian judgment rendered in the Court of Queen's Bench in the province of Ontario. The plea was the general issue, with notice of set-off and other special matter in bar of the suit. Under the set-off defendant claimed to be entitled to a judgment. There was no contest as to the amount of the plaintiff's claim upon the trial. The record of the Ontario judgment was introduced in evidence without objection, and the plaintiff's counsel rested his case.

The defendant then examined two witnesses upon his part, and, when nearly ready to close the defense, counsel for plaintiff announced to the court that he was taken by surprise by the defendant's testimony; was not then prepared to meet it; and asked leave of the court to submit to a nonsuit, with the right to move to set the same aside. This application of plaintiff's counsel was objected to by the defendant, on the ground that since the suit was commenced the Statute of Limitations had commenced to run against the claim stated in his notice of set-off. The objection was overruled by the court, and counsel for the defendant excepted. Counsel for defendant thereupon admitted the plaintiff's claim for $531,000 stated in his declaration, and claimed his readiness to make proof of his offset to the amount of $646,348 and insisted upon his right to proceed with the trial, establish his claim, and have a verdict for the surplus in his favor, and requested the court to permit him to do so. Counsel for plaintiff objected, the court sustained the objection, and defendant's counsel again excepted. These two exceptions are now before us for consideration, and only these.

The question is simply this: Whether, under our statute, when the defendant has given notice of set-off and claims a balance in his favor, the plaintiff can discontinue his suit, or be permitted to discontinue it, without the consent of and against the wishes of the defendant.

Set-off is a mode of defense. By it the existence of the demand sued upon is, in a certain sense, admitted; but at the same time,

the defendant sets up a demand against the plaintiff to counterbalance it, in whole or in part, and under our statute the defendant may have judgment for any balance found in his favor. Originally, the defendant's claim could only be allowed to the extent of the plaintiff's demand proved on the trial. Toml. Law Dict: Babbington on Set-off, 1. At common law the defendant was in no instance allowed to recover judgment for damages for a positive claim against the plaintiff. To obviate the rigor of this rule of law, and to avoid a multiplicity of suits where mutual cross-demands existed, unconnected with each other, and to have the whole adjudicated upon in one action, was the great object of the statute of set-off. Ward v. Fellers, 3 Mich. 281.

The right of set-off at law is given by statute, and is, of course, limited by it. The common law never recognized it. Bacon Abr. tit. "Set-off:" Woods v. Ayres, 39 Mich. 345.

How. Stat., § 6886, of the chapter authorizing set-off in justice's court, reads as follows: "If the amount of set-off duly established be equal to the plaintiff's debt, judgment shall be entered for the defendant, with costs; if it be less than the plaintiff's debt, the plaintiff shall have judgment for the residue only, with costs; if it be more than the plaintiff's debt, and the balance found due to the defendant from the plaintiff in the action be three hundred dollars or under, judgment shall be rendered for the defendant for the amount thereof, with costs; and execution shall be awarded as upon a judgment in a suit brought by him; but no such judgment shall be rendered against the plaintiff when the contract which is the subject of suit shall have been assigned before the commencement of such suit, nor for any balance due from any other person than the plaintiff in the action." The same provisions are made applicable to proceedings in courts of record, in cases of set-off. See How. Stat., §§ 7367, 7368.

The object of the statute is beneficial and equitable, and in its operation it proceeds upon equitable principles. Downer v. Eggleston, 15 Wend. 55, 56.

The doctrine of set-off was borrowed from the doctrines of compensation of the civil law, and constituted an important part thereof. 2 Poth. Obl. No. 13, p. 99; Duncan v. Lyon, 3 Johns. Ch. 359; Reab v. McAlister, 8 Wend. 115; Whitaker v. Rush, 1 Ambler, 407. This doctrine was also followed to some extent in the English courts before the statutes of set-off were enacted.

See Chapman v. Derby, 2 Vern, 117; Lindsay v. Jackson, 2 Paige, 581. And while it is true that the right of set-off is statutory, and we cannot enlarge the right beyond what the statute reasonably allows, yet the courts may, and it is their duty, in determining regulating and applying the practice, in securing and enforcing that right, to be liberal in their action, and to give the law such construction as will secure all the benefits and advantages intended.

The right of the plaintiff at common law to voluntarily submit to a nonsuit, or to discontinue his suit at any time before the jury have rendered their verdict, is well supported by the authorities, and has always been the practice in this State when no set-off has been pleaded. 3 Chit. Pr. 910; 1 Burrill's Pr. 241; Wooster v. Burr, 2 Wend. 295; Circuit Court Rule 26; 1 Green's Pr. 447, 279; Slocomb v. Thatcher, 20 Mich. 52. I think that when the set-off is purely defensive, and no affirmative action is required on the part of the court or jury, the right of the plaintiff to become nonsuited at his pleasure, before verdict or judgment, should be in the discretion of the court; which discretion should not be exercised against the right, except in cases where the rights of the defendant might be prejudiced.

Under the statute, however, authorizing a judgment to be rendered in case of set-off for any balance found due the defendant upon trial, the rule is and should be different. In such a case, really two suits are pending before the court to be tried at the same time. In the one the plaintiff has the affirmative of the issue; and in the other, the defendant has the affirmative. It is only after the trial, when the extent of each party's claim has been ascertained, that the liquidation of the smaller claim occurs by way of set-off, or can be made by the court or jury.

The statute requires the defendant to bring forward his claim for adjudication at the time the plaintiff brings his suit, and thereby determines the time when the defendant shall have his claim adjudicated, at the peril of doing so at his own expense. In all other respects the case stands as though two separate suits were brought to determine the rights of the parties; and I fail to see why both cases should not be governed by the same rules, and receive the same treatment at the hands of the court. Simple justice requires this, and I can see no reason why the equitable rules upon which the whole doctrine of set-off is based should not be carried out in the practice of these cases. Adopting this

rule, the plaintiff would have no more right to discontinue the defendant's suit than the latter would that of the former; and such, I think, should be the law.

These views find support in the following authorities, which I think should govern this case: Thomas v. Hill, 3 Tex. 270; Bradford v. Hamilton, 7 Tex. 55, 58, 59; Francis v. Edwards, 77 N. C. 271, 275; Riley v. Carter, 3 Humph. (Tenn.) 230; Rees v. Van Patten, 13 How. Pr. 258; Cockle v. Underwood, 3 Duer, 676; Van Alen v. Schermerhorn, 14 How. Pr. 287.

I think the exceptions of defendant's counsel to the action of the court, in not allowing the defendant to make full proof of his claim and take judgment therefor, were well taken. The judgment must be reversed with costs and a new trial granted.

CAMPBELL, J. Concurred.

COOLEY, C. J. In this case the defendant relied upon a set-off, which, he claimed, was larger than the plaintiff's demand, and he brings the case to this court, assigning for error the order of the Circuit Court permitting the plaintiff, notwithstanding his objection, to submit to a nonsuit.

The general right of the plaintiff to discontinue his suit or to submit to a nonsuit, at any time before verdict, is undoubted; and in the absence of any statute taking away the right it exists in the cases where set-off is relied upon, to the same extent as in other cases. This is fully recognized in Cummings v. Pruden, 11 Mass. 206, and Branham v. Brown, 1 Bailey 262. In several states statutes have been passed taking away the right, but we have no such statute. The fact that the statute of set-offs permits judgment to be taken by the defendant for the balance found due him, does not preclude a discontinuance. Cummings v. Pruden, *supra*.

But it is said there are decisions to the contrary of these, and several are referred to. The Texas cases are not in point, as they are decided under the civil law, which does not prevail in this State. Egery v. Power, 5 Tex. 501; Walcott v. Hendrick, 6 Tex. 406; Bradford v. Hamilton, 7 Tex. 55. The case of Francis v. Edwards, 77 N. C. 271, was decided upon a construction of the code of that State, and therefore has no bearing. In Riley v. Carter, 3 Humph. 230, the defendant had obtained judgment for his set-off in justice's court, and the plaintiff removed the case to the Circuit Court by certiorari, and then, in that court, was given leave to dismiss his suit. This was pal-

pable error, and the court so held; but we discover no analogy between that case and this. The defendant had his judgment, and unless error was shown, had a right to retain it. The three New York cases of Cockle v. Underwood, 3 Duer, 676; Rees v. Van Patten, 13 How. Pr. 258, and Van Alen v. Schermerhorn, 14 How. Pr. 287, are not in point, because decided under the State code; but so far as they can be considered as having a bearing, they are against the defendant instead of for him, for they all recognize the power of the court in its discretion to permit the plaintiff to discontinue; which is all that is necessary to sustain this judgment.

The judgment should be affirmed.[1]

CHAMPLIN, J., concurred.

ANONYMOUS.

Bellewe, Les Ans du Roy, Richard II, 251.

SKIPWITH reported to BELKNAPP that a *nisi prius* was held before him at St. Martins upon an issue of *plene administravit*, and the plaintiff alleged assets; and the plaintiff was called and came, and the inquest returned and found that he had fully administered except ten shillings and a chest. SKIPWITH asked the inquest the value of the chest, and the inquest considered, and upon this, the plaintiff prayed that he be called; SKIPWITH: *Nous volumus de bene esse et nemy de rigore juris;* and the plaintiff was called and came not, and the inquest said after

[1] Accord: Wooster v. Burr, 7 Wendel 295; Conrad v. Finck, 47 Mo. 173 (prior to present code): The matter is now largely regulated by statute. See Ill. Statutes 1913, Chap. 110, § 48; Mo. R. S. 1909, § 1878.

In Wisconsin and several other states, a dismissal leaves the counter claim unaffected. Bertchy v. McLeod, 32 Wis. 205. When a non suit is taken and judgment rendered for defendant on a set off, the plaintiff is not barred from a second action. Anderson v. Gregory, 43 Conn. 61.

After a verdict for defendant has been set aside, plaintiff cannot take a non suit so as to deprive defendant of appellate review. Floody v. Great Northern Ry. Co., 104 Minn. 517.

For other situations where the rights of the defendant preclude a non suit. Carlton v. Darcey, 75 N. Y. 375.

this that the chest was of the value of half a mark. And now he asked if the plaintiff should be nonsuited in this case. BELKNAPP: Yes, certainly, because at any time before full verdict given the plaintiff can be nonsuited; and in assize, if the verdict makes a difficulty, or in case the justices send out the inquest to inquire further, and again if there is further inquiry of the damages, and they have not fully inquired, the plaintiff can be nonsuited, with which Breton, clerk, concurred. SKIPWITH: Of the damages, I think not, when the principal is found. BELKNAPP: Yes, certainly. Breton, clerk, said that at the last term a nonsuit was awarded, etc.

ANONYMOUS.

Bellewe, Les Ans. du Roy, Richard II, 252.

Assize. When the inquest came to give their verdict, the plaintiff was called and appeared, and the assize gave their verdict for the tenant: and the court was opposed to them because of their charge. One for the plaintiffs prayed that he be called. Curia: That is not allowable when the assize have given their verdict, and were adjourned to Westminster. And there upon good advice it was adjudged that he could not be nonsuited after good verdict.

OUTHWAITE v. HUDSON.

7 Exchequer, 380. [*1852.*]

This was an appeal from the decision of the judge of the County Court of Yorkshire. It was an action for the breach of a warranty of a horse; and at the trial, which was held at Leeds, after the judge had directed the jury, and whilst they were deliberating upon their verdict, the plaintiff stated that he elected to be nonsuited. To this the defendant objected; and the judge said that he thought that, as the case had been left to the jury, the application was too late, and that he would therefore take the verdict, but reserve leave to the plaintiff to

move to set the verdict aside, and to enter a nonsuit. The jury found a verdict for the defendant. The plaintiff never moved to set aside the verdict pursuant to the leave reserved, but appealed to this court.

PARKE, B. The judge of the County Court was wrong in refusing to allow the plaintiff to be nonsuited. At common law, the subject had a right to be nonsuited at any stage of the proceedings he may please, and thereby to reserve to himself the power of bringing a fresh action for the same subject-matter. The legislature did not, by the 9 & 10 Vict. c. 95, intend to deprive a plaintiff, who sues in a County Court, of this right, or to take away from these courts the power of nonsuiting, which is incidental to every court. The plaintiff's power of demanding to be nonsuited continued to the last moment—until the jury had given their verdict; or, where the case is tried by a judge without the intervention of a jury, until the judge had pronounced his judgment.

KEAT v. BARKER.

5 Modern, 208. [*B. R. 1697.*]

An action was brought against the defendant for six years wages due to the plaintiff for his salary, being a steward. There was a verdict for the plaintiff at the assizes in Berkshire, and only seven pounds damages given.

It was moved to discontinue the action, and that the *postea* might not be brought in.

Sed non allocatur; for after a general verdict [1] the court will not suffer the plaintiff to discontinue his action: it has been allowed after a special verdict,[2] and an argument at bar; so

[1] Blenkiron v. Gas. Co., 2 Fos. & Fin. 437. "The jury were directed as to whether the defendant's gas caused the explosion, but were unanimous in finding that they used all reasonable precautions. Hawkins applied instantly for a nonsuit; but Cockburn, C. J.—That is too late, although the verdict is not recorded. Verdict for the defendants." Next term Hawkins moved, but the court were clearly of the opinion that the plaintiff was too late in his application for a nonsuit.

[2] After special verdict a discontinuance may be allowed as a matter of discretion. Price v. Parker, 1 Salk. 178; leave to discontinue refused after verdict for plaintiff and motion in arrest, *Anon.* 1 Lev. 48.

likewise after a joining in demurrer, but not after arguing such demurrer. But the statute 2 Hen. 4, c. 7, ordains, "That after verdict a plaintiff shall not be nonsuit;" which was otherwise at common law, for if he did not like his damages he might be nonsuit.

Note: Lord Howard's Case, 1 Sid. 84; Robinson v. Banbrough, 2 Sid. 113. But on special circumstance and payment of costs the court will permit a discontinuance after demurrer argued. Jones v. Pope, 1 Sid. 305, S. C. 1 Saund. 37.

SHAW v. BOLAND.

15 Gray, 571. [*1860.*]

Writ of entry to foreclose a mortgage. At the trial in the Superior Court before LORD, J., the plaintiff's counsel fully opened his case to the jury; called four witnesses, who were sworn generally in the case; proceeded to examine them, in the first instance, to the court, for the purpose, as he said, of showing the existence and loss of the mortgage deed, and of thus laying the foundation for the introduction of secondary evidence of its contents; and stated that he should further examine the same witnesses as a part of such secondary evidence. The witnesses were all cross-examined by the defendant's counsel, and questions were put to them by the judge, who, after hearing the testimony, refused to admit secondary evidence of the execution and contents of the mortgage; and, on the plaintiff's request and to enable him to procure additional evidence, postponed the further hearing of the case for four days, but did not discharge the jury. At the end of the time granted, the plaintiff introduced additional evidence; but the judge did not change his ruling. The plaintiff proposed to become nonsuit, claiming to do so as a matter of right; but the judge refused to permit it, a verdict was taken for the defendant, and the plaintiff alleged exceptions.

METCALF, J. The exceptions must be overruled on the authority of Locke v. Wood, 16 Mass. 317. In that case it was decided that after a cause is opened to the jury, and is begun to be proceeded in before them, the plaintiff has not a right, of his

mere pleasure, to discontinue his suit or to become nonsuit. Mr. Justice JACKSON had previously expressed an opinion to the like effect in Haskell v. Whitney, 12 Mass. 48, 49. Such, therefore, is now the law of this commonwealth, whatever it may be elsewhere, or may have been here under the colonial ordinance of 1641, which is found in Anc. Chart. 46. And this law seems to us to be eminently just. As a nonsuit is no bar to another suit for the same cause of action, a plaintiff might harass a defendant by unlimited litigation, if the court had no authority, in any case, to prevent a nonsuit.

The action of the judge, at the trial of this case, having been an exercise of his judicial discretion, cannot be supervised by us.[1] Nor is the question before us whether he rightly decided that there was not sufficient proof of the loss of the plaintiff's mortgage to warrant parol proof of its contents. A nonsuit was refused, and a verdict taken, solely—so far as the exceptions show—because the plaintiff did not produce legal proof of the mortgage which was necessary to the maintenance of his action, although the court had granted him all the time that he asked for to procure such proof.

Exceptions overruled.

BERRY v. SAVAGE.

2 Scammon, 261. [*1840.*]

LOCKWOOD, Justice, delivered the opinion of the court: The following bill of exceptions was taken on the trial of this cause, to-wit: "Be it remembered, that on the trial of this cause, after

[1] In the case of Lock v. Woods, 16 Mass. 317, the nonsuit was asked and refused after verdict was announced but before it had been recorded. In Washburn v. Allen, 77 Me. 344, in a trial without a jury, plaintiff asked to take a nonsuit at the close of the evidence which was refused as a matter of law; the Supreme Court after an exhaustive review of the English, Massachusetts and other New England cases, reversed in order that the trial court might pass on the request as a matter of discretion. In Means v. Wells, 12 Metc. 356, a nonsuit was allowed as a matter of discretion after the trial had been begun by the introduction of evidence.

A hearing before an auditor or referee is not a trial within the meaning of this rule. Carpenter v. Ry., 184 Mass. 98. But see Allen v. Hickman, 156 Mo. 49.

the evidence had been submitted to the jury, and the jury had retired to consider their verdict, the jury returned into court, and inquired whether or not the note was to be considered by them as it read. The note had been read to the jury as evidence, under the declaration, without objection, but upon the return of the jury into court, and their making the inquiry aforesaid, it appeared, upon examination of the note, that it was made payable on the .... day of .... one thousand eighteen hundred and thirty.

"The variance between the note and the declaration had not before been discovered by the court, or mentioned by the counsel on either side.

"The court informed the jury, that they were bound to consider the note as it read, and as not being due until time expressed on its face; and if, from their reading of the note it did not appear to be due, they must find for the defendants. Whereupon, the plaintiff's counsel stated that he had never before discovered the variance between the note and the declaration, and moved the court to permit him to suffer a nonsuit, which motion being objected to by the defendant's counsel, the court overruled, and refused to permit the plaintiff to suffer a nonsuit. The plaintiff, by his counsel, excepts." Etc.

The assignment of errors questions the correctness of the instructions to the jury, and the refusal to permit the plaintiff to suffer nonsuit.

At common law, a plaintiff was permitted to take a nonsuit, at any time before the verdict was rendered in court. (Wooster v. Burr, 2 Wend. 95.) But by the 13th section of "an act regulating the practice in the Supreme and Circuit Courts of this State, and for other purposes," passed March 22, 1819, it is provided, that "every person desirous of suffering a nonsuit on trial, shall be barred therefrom, unless he do so before the jury retire from the bar." (R. L. 486; Gale's Stat. 528.)

In order to bar the plaintiff's right of submitting to a nonsuit, the jury must have the whole of the case, including not only all the evidence, but the instructions of the court. Consequently, if, for any cause, the jury retire from the bar without having the whole of the case on which they are to render verdict, the plaintiff's right to submit to a nonsuit is not taken away.

Many cases might be put, where the greatest injustice would result if this were not the rule.

The facts in this case, however, show the necessity of construing the statute in the manner above indicated.

Had the defendants objected to the reading of the note in evidence, or had they discovered the variance before the jury went out, there can be no doubt that the note would have been rejected by the court, and the consequence would have been, that the plaintiff would have been nonsuited. The objection ought strictly to have been by defendants to receiving the note in evidence; and it perhaps may well be doubted, whether under the circumstances of the case, the court would not have been justified in charging the jury, that they had a right to consider the note as due, if they believed from the face of the note, that the word "eighteen" was written by mistake for "eight." Without intending, however, definitely to decide this point, we are clearly of opinion that the plaintiff had a right to submit to a nonsuit, when the instructions, were given.[1] For not permitting the plaintiff to suffer a nonsuit the judgment below is reversed with costs and judgment of nonsuit rendered in this court.[2]

Judgment reversed.

[1] Accord: Hensley v. Peck, 13 Mo. 587.

[2] Day, C. J., in Harris v. Beam, 46 Ia. 118, "Section 2844 of the Code provides that an action may be dismissed by the plaintiff before the final submission of the case to the jury, or to the court, when the trial is by the court.

"It is claimed by appellant that the cause had been finally submitted, and that the time for dismissing the cause had passed. In every case finally submitted there must be some moment of time in which the condition of being finally submitted is assumed. Ordinarily there is no difficulty in determining whether or not a case has been submitted. But the difficulty increases with approach to the time which marks the line of demarkation between a case finally submitted and one not finally submitted, and becomes greatest when that precise time is reached. If the last word of the court's charge to the jury had not been read, it would probably be conceded that no final submission had occurred. But, as the charge had been fully read, it is claimed nothing further remained for court or counsel to do, and that the cause was finally in the hands of the jury. This case presents the question, perhaps, in the most difficult light of which it is susceptible. * * *

"A cause is not finally submitted to the jury when the last word of the charge is read. In practice, the jury are directed by the court to retire in charge of a sworn officer to consider of their verdict, or to enter upon the consolidation of the case without retiring.

"This direction by the court to the jury to enter upon the consideration of the case may fairly be regarded as the moment when the final submission of the cause occurs. An

NASHVILLE, CHATTANOOGA & ST. L. RY. v. SANSOM.

113 Tennessee, 683. [*1904.*]

Mr. Justice NEIL. This action was brought in the Circuit Court of Grundy county to recover damages for the alleged wrongful killing of John W. Sansom, the husband of the plaintiff below. A jury was impaneled to try the cause, and the plaintiff introduced her evidence. After the plaintiff had introduced all of her testimony, the defendant demurred to the evidence, and the plaintiff joined issue thereon. The merits of the demurrer were then argued before the court by the respective counsel. After this discussion was closed the plaintiff moved the court for leave to take a nonsuit. This motion was granted, and the plaintiff's case was accordingly dismissed, without any action upon the demurrer. To this judgment the defendant below, who is the plaintiff in error here, excepted, and prayed an appeal to this court, and has assigned errors.

The point raised here is that under our statute the motion for leave to take a nonsuit came too late.

We have three sections bearing upon the subject. They are as follows:

Shannon's Code, § 4689: "The plaintiff may, at any time before the jury retires, take a nonsuit or dismiss his action as to any one or more defendants, but if the defendant has pleaded a set-off or counterclaim, he may elect to proceed on such counterclaim in the capacity of a plaintiff."

Section 4690: "The defendant may, in like manner, withdraw his counterclaim at any time before the jury retires to consider of their verdict."

Section 4691: "If the trial is by the court instead of the jury the nonsuit or dismissal provided for in the last two sections shall be made before the cause is finally submitted to the court, and not afterwards."

The counsel for the respective parties have argued the case

attorney cannot always tell whether he can safely submit his cause to the jury upon the evidence introduced until he hears the charge of the court. If, in his judgment, the charge is so adverse to him that he cannot safely trust his case in the hands of the jury, he ought, at that moment, to be permitted to dismiss without prejudice to a further action. The statute, in our judgment, does not deny him that right."

somewhat at cross-purposes; it having been insisted for defendant in error that the decision should be governed by section 4689, and the plaintiff in error that it should be governed by section 4691.

The first theory advanced for the defendant in error is that the case remained before the jury notwithstanding the demurrer to the evidence, and that the right to take a nonsuit had not been lost, because it does not appear that the jury had retired from the box at the time the motion was made. The theory advanced for the plaintiff in error is that, when issue was joined on the demurrer to the evidence the case was taken from the jury, and at once became a matter to be tried before the court; and that, when the argument was concluded, the case was thereby finally submitted to the court, and it was then too late to take a nonsuit.

We are of opinion that the position of the defendant in error is untenable. Reading sections 4689 and 4690 together, it is perceived that by the retiring of the jury is meant the point of time when the case is submitted to them "to consider of their verdict." The reference is to the practice of the actual withdrawal of the jury from the box for the purpose indicated. Sometimes, however, after the argument is closed, and all instructions have been delivered to them, the jury are permitted to make up their verdict in the box without an actual retiring for the purpose. We are of opinion the legislature intended that the right to take a nonsuit in a jury case should finally cease when the jury should properly begin to "consider of their verdict," under the law as above stated, whether there should be an actual withdrawal from the jury box or not. The substance of the matter is that there shall be no nonsuit allowed after a case has been fully committed to the consideration of the jury.

In the case referred to in the preceding paragraph there is a duty devolved upon the jury to determine the facts admitted in evidence before them, and to apply thereto the instructions delivered to them by the court, for the purpose of rendering a verdict thereon. But when there is a demurrer filed to the evidence the case is withdrawn from the jury, the court gives them no instructions, and it is not in their power to render a verdict, the facts being fully ascertained by the joinder in demurrer. It is true the case, after having been so withdrawn,

may be again submitted to them for the purpose of estimating damages, if the judge overrules the demurrer; but until it is so committed to them again it is as fully out of their control as if it had never passed thereunder. The circuit judge, on overruling the demurrer, may submit the case for the assessment of damages to the same jury or to a new jury, as he may deem best. Of course, if he should promptly decide the questions arising on the demurrer against the defendant, he would submit the case again to the same jury, unless that jury had been previously directed to withdraw from the box. However, the circuit judge is not compelled to decide such matters promptly, but may hold them under advisement, and we suppose, as a matter of fact, the judges do frequently hold them under advisement for a day or two, or several days, for the purpose of making such investigations as they deem the merits of the questions raised require of them. So it is not the duty of the circuit judge to decide the demurrer at once. He may do so or he may take time for consideration. The probability that time may be required for the purpose of examining authorities and for reflection, extending over several days, it may be, is inconsistent with the view that the jury previously impaneled are still attached to the particular case, with their functions merely suspended, awaiting the action of the trial judge. No circuit court could be properly conducted in this manner. There might be at the same time several juries outstanding with suspended functions, and all other work of the court blocked, awaiting the decision of the judge upon the demurrer. We conclude, therefore, that the only proper view of this phase of the matter is that the case is completely withdrawn from the jury and is submitted to the court.

Such was the status in the present case when the motion for leave to take a nonsuit was made. The case had been withdrawn from the jury and submitted to the court.[1] It was then con-

[1] Philips against Echard, Cro. Jac. 35: "And note, that in a case of Alderley v. Alderley this term, in debt upon an obligation, the case being argued upon a demurrer (to the pleadings), the opinion of the court was against the plaintiff, and rule was given that judgment should be entered for the defendant; but the plaintiff prayed that he might be nonsuited; and because he had the same term appeared and argued by his counsel, and had prayed judgment, it was adjudged that he could not be nonsuited the same term."

After demurrer sustained to a

trolled by section 4691. There was a final submission to the court when the argument on the demurrer to the evidence was at an end. The section of the Code last referred to provides that, when the case has reached this stage, no nonsuit shall be allowed. The language is that the nonsuit shall be taken "before the cause is finally submitted to the court, and not afterwards."

It is insisted for the plaintiff that, even if the court should hold that the time for taking the nonsuit had passed when the motion therefor was made, yet a discretion remained to the court below to grant or refuse; citing Cyc. Vol. 14, p. 403. We do not say that a case might not arise under which the court would have such discretion; nor do we hold that the court would have that discretion. It is unnecessary to pass upon the point in the present opinion, for the reason that there is nothing in the case before us to take it out of the ordinary, or to move the discretion of the court for special action. Moreover, it is observable, upon a perusal of the sections of the Code quoted, when considered in the light of the common law as it existed when the statutes were passed on which the Code sections were based, that it was the purpose of the legislature to confine the right strictly within the limits laid down. We do not think we have, in this case, the power to pass the bounds fixed. We have considered the authorities presented from other jurisdictions, but find them of small use, since the case must be decided upon a construction of our own statutes.

It results that the judgment of the court below must be reversed, and the cause remanded for action on the demurrer, and for further proceedings.

MEYER v. NATIONAL BISCUIT CO.

168 Federal Rep. 906. [*C. C. A. 1909.*]

BAKER, Circuit Judge. At the conclusion of the evidence in this action for damages on account of personal injuries the defendant company moved for a directed verdict. After argument by counsel for the respective parties the judge announced

pleading and leave to amend, a nonsuit may be taken. Sherf v. Ry., 81 Tex. 471; Alphonso Const. Co. v. Aetna Indemnity Co., 160 Ill. App. 140.

his decision sustaining the motion. Thereupon plaintiff moved for leave to take a nonsuit. This motion was overruled, and plaintiff duly excepted. The judge then gave a peremptory instruction in obedience to which the jury rendered a verdict for defendant.

While it may be true that there is sufficient elasticity in the conformity act (§ 914, Rev. St. U. S. (U. S. Comp. St. 1901, p. 684); Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898; Mexican Central R. Co. v. Pinkney, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. Ed. 699) to permit the United States courts to decide that the State practice giving plaintiffs in actions at law, where jury trial has not been waived, the right to take nonsuits at any time before the jury retire should not be applied to the disposition of a case on demurrer to the evidence, or on the present-day substitute, the motion for a directed verdict (Parks v. Southern R. Co., 143 Fed. 276, 74 C. C. A. 414), nevertheless we believe that the long established custom of the United States courts sitting in Illinois of following the Illinois practice respecting nonsuits should be adhered to, at least until by duly promulgated rules the bar have been advised of the change.

On the facts of this case plaintiff would have been entitled to a nonsuit in the trial courts of Illinois. Brown v. Lawler, 130 Ill. App. 540; Berry v. Savage, 2 Scam. 261; Howe v. Harroun, 17 Ill. 294; Adams v. Shepard, 24 Ill. 464; Gordon v. Goodell, 34 Ill. 429.

In Wolcott v. Studebaker, 34 Fed. 8, Judge Dyer, sitting in the Circuit Court for the Northern District of Illinois, and following precedents established by Judge Drummond and Judge Blodgett, permitted the plaintiff to discontinue after the motion for a directed verdict had been sustained. In the Southern District Judge HUMPHREY ruled that plaintiff's motion for leave to take a nonsuit came too late, if it was not made until after the peremptory instruction had been given and the jury discharged from further service in the case. Drummond v. Louisville & N. R. Co., 109 Fed. 531. The practice is the same in the United States courts in Indiana. Gassman v. Jarvis, 94 Fed. 603.

In Chicago, M. & St. P. R. Co. v. Metalstaff, 101 Fed. 769, 41 C. C. A. 669, the Circuit Court of Appeals for the Eighth Circuit approved the practice of the United States courts sitting

in Missouri of permitting nonsuits in conformity to the practice in the Missouri courts.

The judgment is reversed, and the cause remanded, with the direction to grant plaintiff's motion for a nonsuit.[1]

BEE BUILDING CO. v. DALTON.

68 Nebraska, 38. [*1903.*]

SULLIVAN, C. J. William Dalton sued the Bee Building Company to recover damages for a personal injury. A jury was impaneled to try the issues, and, the plaintiff having submitted his evidence and rested his case, defendant moved the court to direct a verdict in its favor on the ground that there was neither averment nor proof of an actionable wrong. The motion was sustained, but before the peremptory instruction could be given plaintiff asked that the case be dismissed without prejudice, and his request was granted. By this proceeding in error the order of dismissal is brought to this court for review.

Section 430 of the Code of Civil Procedure is as follows: "An action may be dismissed without prejudice to a future action: First—By the plaintiff, before the final submission of the case to the jury, or to the court, where the trial is by the court. Second—By the court, where the plaintiff fails to appear on the trial. Third—By the court, for want of necessary parties. Fourth—By the court, on the application of some of the defendants, where there are others whom the plaintiff fails to prosecute with diligence. Fifth—By the court, for disobedience by the plaintiff of an order concerning the proceedings in the action.

[1] *Semble,* Accord: Gasman v. Jarvis, 94 Fed. 603; Ry. v. Metalstaff, 101 Fed. 769; Knight v. Ry., 180 Fed. 368. The statute involved in the principal case is as follows: Sec. 70, Ill. R. S. 1913, Chap. 110: Every person desirous of suffering a nonsuit shall be barred therefrom, unless he do so before the jury retire from the bar, or if the case is tried before the court without a jury, before the case is submitted for final decision.

The statute under consideration in the Metalstaff Case, 101 Fed. 769, is as follows: Mo. R. S. 1909, § 1980: "The plaintiff shall be allowed to dismiss his suit or take a nonsuit at any time before the same is finally submitted to the jury, or to the court sitting as a jury, or to the court, and not afterward.

In all other cases, upon the trial of the action, the decision must be upon the merits."

Obviously the principal question to be decided is whether there was, within the meaning of this section, a final submission of the case upon defendant's motion.[1] The contention of counsel for plaintiff is that the trial was to the jury and that there could be no submission of the case until the jury had complete authority to deal with it. This argument is plausible, but we can not believe that it is sound. It is true a jury was impaneled, but it is equally true that the case was tried by the court, and not by the jury. The case was submitted upon an issue of law, and the determination of that issue eliminated the jury and ended the controversy. After it had been adjudged that the plaintiff had no case, and that there was no issue of fact to be decided, the direction, reception and recording of a verdict would have been mere ceremonial acts. These acts would, we know, be in accordance with conventional procedure; they would satisfy the requirements of judicial formalism, but they would be as useless and idle, and almost as absurd as the archaic practice of withdrawing a juror in order to secure a continuance.[2] To direct the jury to return a verdict in favor of the defendant would have been to command the triers of fact to ratify a decision already made by the court upon a question of law. When the legislature, in section 430, spoke of "the final submission of the case to the jury," it must have had in mind the submission of an issue of fact—the submission of a disputed question, which might be resolved by the jury in favor of either party. In this case there was no issue of fact—the court so decided; and if a verdict had been rendered in obedience to a peremptory instruction, it would have no legal significance; it would not furnish the basis for a judgment in favor of defendant. In every such case the judgment rests, not on the decision of a question of fact, but wholly and exclusively upon the decision of a question of law. When it was determined that the plaintiff had failed to make a case the court might, without taking from the jury a meaningless verdict, have proceeded at once to render judgment in favor of defendant. To be sure, the procedure would not be

[1] See Bass v. Rublee, 76 Vt. 395, *ante*, p, 355; Bartelott v. Bank, 119 Ill. 259; Diamond Rubber Co. v. Wernicke, 166 Mo. App. 128.

[2] But see Bowman v. Ry., 184 Fed. 697.

according to established usage, but it would be legal and logical and in harmony with modern methods of transacting business. It is, as we view it, entirely clear that the "submission of the case to the jury" contemplated by the statute is the submission of an issue of fact; and where there is no such issue there can not, in any proper sense, be said to be a trial by jury. Indeed, the very essence of a decision sustaining a demurrer to evidence is a denial of the litigant's claim that he is entitled to a jury trial. Before plaintiff moved to dismiss the action without prejudice, his case had been, not only submitted to the court upon a vital issue of law, but that issue had been decided against him and nothing remained open for contention.

"Where a demurrer to the evidence is sustained," says Mr. Justice BREWER in St. Joseph & D. C. R. Co. v. Dryden, 17 Kan. 278, 280, "the case is ready for judgment. It has been finally submitted to the court, and the plaintiff has no more right to dismiss then than he has after a verdict is returned. The case is decided, and the plaintiff has no right to avoid that decision by a dismissal." To permit a party to dismiss under such circumstances is, in substance, to grant him a new trial after he has been fairly defeated and to deprive his adversary of the fruits of a fairly won victory. It is contrary to good sense and sound policy to allow a party to take his case from one court to another until fortune favors him with a judge who is willing to accept his view of the law or his construction of the evidence. "Such a mode of proceeding would," as was said in Conner v. Drake, 1 Ohio St. 166, 170, "be trifling with the court as well as with the rights of defendants." One who is defending against a claim which he believes to be unjust ought not to be subjected to the expense of litigation which settles nothing. And since he is not permitted to choose another forum when it is discovered that the court is against him, it is manifestly unfair to give the plaintiff an unlimited freedom of choice. The tax-paying public, too, have rights which it may be presumed the legislature took into account in adopting section 430. It is, of course, entirely proper that courts should be maintained at public expense to hear and determine all controversies that may be submitted to them, but it is no part of the business of the State in administering justice to provide for sham trials, or to maintain courts for experimental investigation. Indeed, it would be a reproach to our judicial system to permit a defeated litigant to abandon

his case and sue again, thus harassing the defendant and wasting money raised by taxation for public purposes. Our conclusion is that the court erred in sustaining plaintiff's motion and this conclusion is, we think, supported by State v. Scott, 22 Neb. 628; State v. Hazlet, 41 Neb. 257; Beaumont v. Herrick, 24 Ohio St. 445, and other cases. Authorities sustaining the position for which plaintiff contends are numerous enough, but they fail to distinguish between cases in which there is an issue to submit to the jury and those in which there is not. Their reasoning is not convincing and we decline to follow them.

A further contention on behalf of plaintiff is that if the dismissal was not a matter of strict right it was at least a warrantable exercise of a discretionary power vested in the court. The record does not show that the court undertook to exercise a discretionary power or that the situation called for the exercise of such power. The application was evidently made and granted as a demandable right. The plaintiff's only reason for wishing to dismiss was that the court held his evidence to be insufficient. He did not claim then, and he does not claim now, that he failed to produce all the evidence obtainable. There is no suggestion of surprise, mistake or accident; there is no intimation that the case submitted was not as strong as it is ever possible for plaintiff to make it. If the dismissal be regarded as an exercise of judicial discretion, it must have been claimed and allowed on the theory that it was right and proper that plaintiff should have the judgment of another trial court upon his case. Such a theory is, of course, inadmissible. * * * The discretionary power of the District Court to set aside a submission and receive further evidence, or to postpone the trial, or even to permit a dismissal of the case, is not doubted,[3] but there is nothing in the present record to indicate that there was any just ground for the exercise of such power, or that there was any attempt to bring it into action. The court was evidently of the opinion that, the peremptory instruction not having been yet read to the jury, the right of plaintiff to dismiss was absolute. This was an erroneous conception and it led to a wrong result.

The decision is reversed and the cause remanded for further proceedings.

[3] As to the discretion of the court in such cases, see Nelson v. Ry., 93 Neb. 154.

DRUMMOND v. L. & N. RY. CO.

109 Federal Rep. 531. [*C. C. 1901.*]

On motion to set aside verdict and allow plaintiff to suffer a nonsuit.

HUMPHREY, District Judge. This is an action brought by an administrator for damages for the death of his intestate. The case was tried by a jury. At the close of plaintiff's evidence, the court gave a peremptory instruction, directing the jury to find for the defendant, and discharged the jury from further service in the case. Thereupon, and while the jury still remained in their seats, counsel for plaintiff moved the court that the plaintiff be allowed to suffer a nonsuit. The statute of Illinois controls the question. Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; Gassman v. Jarvis, C. C., 94 Fed. 603. The statute of Illinois reads as follows: "Every person desirous of suffering a nonsuit on trial shall be barred therefrom unless he do so before the jury retire from the bar." § 49, *c.* 110 Hurd's Rev. St. The actual withdrawal of the jury from their seats is not necessary to constitute a retirement, within the meaning of the statute. 94 Fed. 603, *supra*. The court has actually given the instruction, and has discharged the jury, and the record, including the verdict, is made up by the peremptory order of the court. This constitutes a retirement, within the meaning of the statute,[1] and the plaintiff's right to suffer a nonsuit is barred by the statute. The motion is overruled.

LAWRENCE v. SHREVE.

26 Missouri, 492 [*1858.*]

NAPTON, J. We think the plaintiff should have been allowed to take a nonsuit in this case. The statute says: "The plaintiff shall be allowed to dismiss his suit, or to take a nonsuit, at any time before the same is finally submitted to the jury, or the court sitting as a jury, or to the court." When a case is tried by a jury

[1] Nonsuit refused when application was made while directed verdict was being signed. Ritchie v. Arnold, 79 Ill. App. 406.

it has been the uniform construction of this law, in practice, to allow a party to get the opinion of the court upon the law of his case in the form of instructions and then withdraw his suit if that opinion is unfavorable. The same opportunity ought to be afforded in cases where the court is permitted to decide the law and try the facts as a jury, if the parties request a declaration of the law from the court.

In this case the court took the question of law under advisement, and when the decision was made the whole case was decided together, and no opportunity given for a nonsuit. The instruction given for the defendant was merely an instruction upon the evidence that the plaintiff was not entitled to recover; but the character of the instruction can not vary the rights of the parties, and would rather seem to make it more imperative on the court to give the plaintiff an opportunity of determining whether he would proceed further with the case. The plaintiff can not insist upon immediate determination of the law asked for by the instructions offered; but if the court takes them under advisement, proceeding on with other business, it would seem to be reasonable, where no day is announced, or by some rule of court established in which the decision will be made known, that the parties or their counsel should be informed when the court is ready to determine the instructions. Any other practice would deprive plaintiff of the right given him by the statute to take a nonsuit at any time before the final submission of the case.[1]

The judgment will be reversed, and the plaintiff has leave to enter a nonsuit; the other judges concur.

TOOF v. FOLEY.

87 Iowa, 8. [*1893.*]

This is an action at law based upon a judgment of the Circuit Court of Shelby county, in the state of Tennessee. There was a trial before the court, a jury having been waived, and a judg-

[1] For an exhaustive review of the Missouri cases, see Lawyers Pub. Co. v. Gordon, 173 Mo. 139.

Prior to the amendment in 1907 of the Illinois Practice Act (R. S. 1913, Chap. 110, § 70), in trials without a jury a nonsuit might be taken after finding announced and before record entry made. Howe v. Harroun, 17 Ill. 494.

ment was rendered for the defendant for costs. The plaintiffs appeal.

ROTHROCK, J. It appears from the record that after the testimony was all introduced, and pending the announcement of the decision of the case by the court, the plaintiffs asked permission to withdraw the cause and dismiss their action. An objection was interposed by the defendant, and the right to dismiss the case was denied. There was no error in this ruling. The cause was finally submitted to the court before the motion to dismiss was made, and it was not only finally submitted, but the court was announcing the decision. The application to dismiss came too late. Code (§ 2844); Dunn v. Wolf, 81 Iowa, 688. The judgment of the District Court is affirmed.[1]

(b) *When set aside or reviewed.*

YOUNG AND ENGLEFIELD'S CASE.

Godbolt, 328. [*1624.*]

Young brought an action of trespass for entering his close, etc., abutted upon one side with Pancras, and butted on the other side with Grayes-Inne-Lane. Upon not guilty pleaded, the parties were at issue; and the record of Nisi Prius was *Graves*-Inne Lane; and thereupon the party was nonsuit. And now it was moved to have a venire facias de novo. And a case was cited expresse in the point, betwixt Farthing and Dupper, 9 Jacobi Rot. 1349, where in an action upon the case upon assumpsit, the plea-roll was six weeks, and the record of Nisi Prius six months; and the jury being sworn, the plaintiffe was nonsuit; and a venire facias de novo was awarded, and the nonsuit was recorded. Ley Chief Justice. You cannot have a new venire facias if the nonsuit be recorded; and if the record of Nisi Prius varieth from the record, then it can be no nonsuit, because there is no record upon

[1] A nonsuit cannot be taken after case is argued and taken under advisement by the court. Aetna Ins. Co. v. Hamilton County, 79 Fed. 575. But see Robinson v. Lawrence, 7 Exch. 123, where in a trial without a jury, a nonsuit was held proper after Judge had intimated his opinion.

which the nonsuit can be, and the Nisi Prius was prosecuted without warrant. Judicial process are of record, because they are by the award of the court; but if the transcript of a record be mistaken by a clark, it issueth out by the award of the court; and if it vary, then it is no record. The *president* cited is direct in the point: there was a venire facias de novo; but I conceive there is a difference where the jury is sworn, as it is in the *president*, and then the plaintiffe is nonsuit; but in our case the plaintiffe was nonsuit before the jury was sworn. But per Curiam the case is the stronger to have a new trial.[1]

SEARLE v. LORD BARRINGTON.

2 Strange, 826. [*K. B. 1729.*]

The plaintiff brought an action on a bond entered into to her husband by one Wildman, under whom the defendant claimed, and the bond was dated June 24, 1697. The defendant pleaded *solvit ad diem*, and relied upon the presumption, it being after twenty years; to encounter which the plaintiff at the first trial of the cause, which was in Trin. 10, Geo. 1, offered to give in evidence the indorsement of interest under the hand of the obligee in the year 1707, which was three years before the death of the obligor; but PRATT, C. J., before whom it was, being of opinion it ought not to be given in evidence, from the danger of letting the obligee make indorsements, which might be done at any time; the plaintiff was nonsuit, and afterwards moved the court against the opinion of the chief justice; and upon debate the other three judges were of opinion, it ought to have been left to the jury; for they might have reason to believe it was done with the privity of the obligor, and the constant practice is for the obligee to indorse the payment of interest, and that for the sake of the obligor, who is safer by such an indorsement, than by taking a loose receipt. But an objection arising, that after a nonsuit the plaintiff was out of court, and could not have a new trial, no rule was made, and she was left to bring a new action.[1]

[1] Accord: Acquila Weeks Case, Cro. Car. 203.

[1] Accord: Lore v. Day, Barnes, 311 (7 Geo. 2); Hartley v. Atkinson, Barnes, 317 (25 Geo. 2); Forbes v. Wale, 1 W. Blackstone, 532 (1764) *Semble*.

Accordingly a new action was brought and tried at Guildhall before Chief Justice RAYMOND, who suffered the indorsement to be read, and the jury found for the plaintiff. The defendant tendered a bill of exceptions, which was sealed; and after judgment for the plaintiff, a writ of error was brought in the exchequer chamber and the bill of exceptions returned as parcel of the record. And upon argument Chief Justice EYRE, Chief Baron Pengelly, Denton, Hale and Price were of opinion to affirm; and Carter and Comyns to reverse. So the judgment of B. R. was affirmed this term.

In February, 1730, this judgment was affirmed in Parliament.

BUSCALL v. HOGG.

3 Wilson, 146. [*C. B. 1770.*]

Trover for a great many goods, to the value of £700.

Upon not guilty pleaded, this cause was tried at the last assizes for the county of Norfolk, before Lord Chief Baron PARKER. Whereupon it appeared on the plaintiffs' evidence, by seven witnesses, that Thickpenny was an inn keeper; and that he not only sold liquors to his guests (*hospitantibus*) in his inn, but also sold divers quantities of wine, rum and brandy, by four, five and six gallons at a time, to several persons living two and three miles distant from his inn, for them to retail out and sell again, and had done thus for some years; whereupon it was insisted by the counsel for the plaintiffs, at the trial, that this sort of trading by an inn keeper, made him liable to a commission of bankrupt, but the Chief Baron, without hearing any other evidence, was of a different opinion; and ordered the plaintiffs to be nonsuited, with leave to move the court for a new trial, without costs, in case he was mistaken in his opinion.

And now upon the motion of Sergeants Whitaker and Forster, to set aside the nonsuit, the court was clear of opinion that the plaintiff ought not to have been called, but the matter ought to have been more fully sifted and gone into at the trial; that it not appearing to the court here what proportion Thickpenny's trade in his inn bore to his trading abroad and out of doors, they could not judge whether he was liable to be a bankrupt or not;

and therefore they set aside the nonsuit, and granted a new trial without costs.[1]

COSSAR v. REED.

17 Q. B. (N. S.) 540. [*1851.*]

Error from the Borough Court of Kinston upon Hull. The action in the court below was debt for goods sold and delivered within the jurisdiction of the court, and on accounts there stated. Plea: Never indebted. Issue thereon. The record set forth the venire, the coming of the jury and their being sworn, and that the jury, "after evidence being given to them, thereupon withdrew from the box here to consider of the verdict to be by them given of and upon the premises; and, after they had considered thereof, and agreed amongst themselves, they returned to the box to give their verdict in that behalf. Whereupon the plaintiffs, being solemnly called, came not; nor do they further prosecute their writ against the defendant. Therefore it is considered," etc. Judgment of nonsuit.

Tacked to the record was a bill of exceptions, which set forth at length the evidence given on the trial before the Recorder, as judge of the Borough Court; objection by the defendant that the evidence was of a cause of action not accruing within the jurisdiction; contention by the plaintiff's counsel, that there was evidence on each count; and ruling of the judge that there was no evidence in support of either count. "And the said judge of the court aforesaid, having so declared his opinion and decision in favor of the said defendant on the issue aforesaid with respect

[1] Accord: Rockham v. Jessup, 3 Wil. 332 (C. B. 1772); Sadler v. Evans, 4 Burrow, 1985 (B. R. 1766); Harris v. Batterly, 2 Cowper, 433 (B. R. 1776); Brine v. Rawlings, 7 East, 279 (B. R. 1806); Ward v. Mason, 9 Price 291 (1821); Lawrence, J., in Butler v. Dorant, 3 Taunton 229 (1810) on motion for a rule *nisi* to set aside a nonsuit for misdirection: "His Lordship did not say you should be nonsuited, he directed the jury that you should have nominal damages only; but you did not choose to trust your case with the jury. If there were a misdirection, you should have abided the verdict, and have reserved the objection for a motion for a new trial. I believe this has never been done, that a counsel shall lie by, until he hears the opinion of the Judge at *nisi prius*, and that if he thereupon chooses to be nonsuited, he shall come to court to set aside his own act."

to both counts, nonsuited the plaintiffs. Whereupon the counsel for the plaintiffs, conceiving that such opinions and decisions of the said judge were erroneous and bad in law, made his exceptions to the said opinions, decisions and judgments of the said judge." It then stated the tendering and sealing of the bill of exceptions.

Lord CAMPBELL, C. J., on a subsequent day in this term (Nov. 21) delivered judgment.

We are of opinion that, if upon the trial of a cause the judge directs a nonsuit, and the plaintiff does not appear when called, he cannot tender a bill of exceptions and bring a writ of error, assigning for error that the judge improperly directed the nonsuit. The proper course would have been for the plaintiff, when called, to have appeared and required the judge to direct the jury in point of law in his favor. Upon the judge refusing to do so, or refusing to permit him to appear, he might have tendered a bill of exceptions and brought a writ of error. He had a clear right, if he had so thought fit, to have the issues joined submitted to the jury, and to tender a bill of exceptions upon the judge's direction in point of law; and, if the judge refused to permit him to appear, and insisted on nonsuiting him against his will, this would be a miscarriage for which a bill of exceptions would lie. But, if, acquiescing in the nonsuit, he does not appear, and no direction in point of law is given to the jury, and no verdict is found, we conceive that the supposition of a bill of exceptions is an absurdity. When the plaintiff has made default and abandoned his suit, he is not in court, and it is impossible that he should tender a bill of exceptions. His only remedy is an application to the court from which the record comes, to set aside the nonsuit and grant a new trial. In the vast majority of cases ample justice is thus done to the plaintiff; but, if he distrusts the court from which the record comes, and wishes to put the question of law upon the record, his course is to appear and to insist on the judge directing the jury, and on the jury finding a verdict. That he is entitled to do so is clearly established by Minchin v. Clement, 1 B. & Ald. 252, and various other authorities collected in note 1 to Mounson v. Redshaw, 1 Wms. Saund. 195d, e. 6th ed. A writ of error may be brought where there has been judgment upon a nonsuit; but this is for some error subsequent to the nonsuit, which can so rarely occur that such a writ of error is considered as almost necessarily brought for delay.

In Evans v. Swete, 2 Bing. 326, 328, Best, C. J., says: "It is difficult, indeed, to conceive how error can lie after a nonsuit, except for some mistake in entering up the judgment; error on the original record cannot be complained of when the plaintiff has abandoned all his proceedings."

Mr. Compton placed all his reliance on Strother v. Hutchinson, 2 New Ca. 83, an instance (and the only one to be found in the books) of a bill of exceptions on a nonsuit. But, when examined, it will be found to be no authority for him, as the language of the judges must be construed with reference to the proceedings before them. There the plaintiff, instead of acquiescing in the nonsuit, appeared when called; and the very exception taken was that the judge still insisted on nonsuiting him, instead of leaving the issue to the jury with a direction in point of law how it was to be found. The bill of exceptions alleged that, though the said plaintiff, "the said William John Strother did then and there by his said attorney insist upon the cause being left to the jury, and did offer to abide their determination, and did appear on his being called, and did refuse to consent to a nonsuit; yet the said sheriff" "did then and there" "order the said William John Strother to be called; and did then and there declare that the said William John Strother was nonsuited; and the jury thereupon did not give a verdict; whereupon the said William John Strother, by his said attorney, did then and there except to the opinion of the said sheriff, and did insist" "the illegality of nonsuiting him, the said William John Strother, without his consent, and contrary to his wish." Tindall, C. J., says: "It is then objected that the judge's directing a nonsuit cannot be the subject of a bill of exceptions. I think, however, that such a direction falls within the principle on which that remedy has been provided for errors in judgment at the trial." But this must be understood of directing a nonsuit when the plaintiff has appeared, and refused to be nonsuited. Being still in court and desirous to prosecute his suit, there is no difficulty in supposing that he tenders a bill of exceptions. In the present case there is the following statement in the record of the judgment: "Whereupon the plaintiffs, being solemnly called, came not; nor do they further prosecute their suit against the defendant: Therefore it is considered that the plaintiff take nothing by his writ:" and the bill of exceptions appended to the judgment well shows that the plaintiff acquiesced in the nonsuit, and never offered to ap-

pear. The said judge then declared it to be his opinion and held and affirmed that there was no evidence of an account stated within the said jurisdiction; and the said judge, "having so declared his opinion and decision in favor of the said defendant," "nonsuited the plaintiffs. Whereupon the counsel for the plaintiffs" made his exceptions, etc. No opposition is offered to the nonsuit; and no bill of exceptions is alleged to have been tendered till the plaintiffs, when called, had declined to come forth and were in court no longer. Strother v. Hutchinson, 4 New Ca. 83, therefore, is not an authority in point.

We have only further to observe that extreme inconvenience would follow if a practice were introduced of tendering a bill of exceptions upon the judge's direction in point of law without a finding of the issue by the jury; for the record might thus be carried into the House of Lords, and, after a decision against the plaintiff by the court of last resort, a nonsuit merely would be confirmed, and he would be at liberty to commence a fresh action for the same cause.

Upon the whole, we are of opinion that no error is assigned in the present case of which we can take notice; and that the defendant in error is entitled to our judgment.

Judgment affirmed.[1]

LOMBARD v. CHEEVER.

3 Gilman, 469. [*1846.*]

Replevin in the Marshall Circuit Court, brought by the appellant against the appellees, at the October term, 1846, and heard before the Hon. John D. Caton. The plaintiff, on the exclusion of certain evidence, consented that a nonsuit should be entered with leave to move to set it aside, and for a new trial, but the motion was overruled, and the plaintiff excepted.

The evidence offered and excluded by the court below is stated in the opinion of the court.

Opinion of the court by THOMAS, J. This case comes before us in such a shape as to close our eyes to the errors alleged to exist

[1] Accord: Francisco v. C. & A. Ry. Co., 149 Fed. 354 and cases there cited.

in the record and proceedings of the court below. The plaintiff, in that court, (the appellant in this) chose to submit to a voluntary nonsuit, and consequently can not complain of the judgment thereon here. Barnes v. Barber, 1 Gilm. 404-5.

Nor does the fact that the nonsuit was taken, with leave to the plaintiff to move to set it aside, vary the result. That reservation secured to him only the privilege, which without it, he might not have exercised, of seeking in the circuit court, to avert the consequences, either of the erroneous decisions of that court, as to the sufficiency of his evidence to make out his case, or his own hastiness or improvidence in acting with reference to such erroneous decisions, in suffering a nonsuit. But the remedy for the evils growing out of any such error of the court, or improvidence of the plaintiff, could be sought for only in the mode referred to, in the court, out of whose judgment such evils grew. The right to seek such remedy expired with the unsuccessful effort made to obtain it. Failing to satisfy the Circuit Court of his right to have the nonsuit set aside, all investigation on that subject is forever closed. It is not the order of the court overruling the motion to set aside the nonsuit that is appealed from; that, like the overruling of a motion for a new trial, where a nonsuit has been found by a jury, is but, an interlocutory order; but, as in that case, it is the judgment rendered upon the verdict, so in this, it is the judgment rendered upon the nonsuit, that is brought by appeal into this court. The fact, then, that the judgment complained of was the result of the plaintiff's own volition, and not in *invitum* as to him, still remains as an insuperable obstacle in the way of his demanding a revision by this court, of any of the supposed erroneous decisions of the Circuit Court.[1]

HOWELL v. PITMAN.

5 Mo. 246. [*1838.*]

EDWARDS, J. Howell brought an action of ejectment against Pitman for a tract of land in St. Charles county. Pitman pleaded the general issue. On the trial a witness on the part of the plaintiff proved that he had surveyed the land in dispute, in

[1] See also Rankin v. Curtinius, 12 Ill. 334.

conformity to an order in writing from the surveyor general at St. Louis; which authority he returned to that office with his survey. Defendant's counsel moved the court to exclude from the jury all evidence, parol and written, in relation to the survey, unless a copy of that order from the surveyor general should be produced; and this motion was sustained by the court. After the exclusion of the copy of the survey, and the evidence in relation thereto, the plaintiff excepted to the opinion of the court, and suffered a nonsuit; and now brings his writ of error to reverse the decision of the Circuit Court.

But one question arises on this state of the case, that is, will a writ of error lie on a judgment of nonsuit? By the first section of the act regulating practice in the Supreme Court, it is provided that "writs of error upon any final judgment or decision of any Circuit Court, in all cases, are writs of right." Has there been a final judgment or decision of the Circuit Court on this case? A nonsuit, voluntarily suffered by the party himself, is not a final judgment or a decision of the court, but is a mere act of the party himself, and must always be voluntary, that is, by the plaintiff's counsel submitting to the same, or not appearing; and in no case can it be adverse, or without implied consent, 3 Chit. Prac. 910, and therefore it will not form the basis of a writ of error.

The correct practice now seems to be this: the party suffering a nonsuit must move the court to set it aside, and in discussing this motion all the points involved in the case will be brought under the review of the court. If the motion to set aside the nonsuit be overruled, then the party may take his bill of exceptions, reserving the points and the evidence, and may sue out his writ of error on the decision of the court in overruling the motion to set aside the nonsuit. The decision of the Circuit Court, by which this motion is overruled, has been considered a decision finally disposing of the cause; and therefore, from this decision, the writ of error will lie.[1] English v. Mullanphy, 1 Mo. R. 780; Collins v. Bowman, 2 Mo. R. 195; Johnson v. Strader & Thompson, 3 Mo. R. 359. The judgment of the Circuit court ought, therefore, to be affirmed, and the other judges concurring, it is affirmed.

[1] But under this practice a nonsuit is regarded as voluntary and not reviewable if taken before a ruling is actually made which precludes a recovery. Green Co. Bank v. Gray, 146 Mo. 568 and cases there cited; Lewis v. Mining Co., 199 Mo. 463.

CENTRAL TRANSP. CO. v. PULLMAN'S CAR CO.

139 U. S. 24. [*1890.*]

Mr. Justice GRAY. The principal defense in this case, duly made by the defendant, by formal plea, as well as by objection to the plaintiff's evidence, and sustained by the Circuit Court, was that the indenture of lease sued on was void in law, because beyond the powers of each of the corporations by and between whom it was made.

There is a preliminary question of practice, arising out of the manner in which the case was disposed of below, which is deserving of notice, although not mentioned by counsel in argument.

The Circuit Court, in ordering a nonsuit because in its opinion the evidence offered by the plaintiff was insufficient in law to maintain the action, acted in accordance with the statute of Pennsylvania, which provides that "it shall be lawful for the judge presiding at the trial to order a judgment of nonsuit to be entered, if in his opinion the plaintiff shall have given no such evidence as in law is sufficient to maintain the action, with leave, nevertheless, to move the court *in banc* to set aside such judgment of nonsuit; and in case the said court in banc shall refuse to set aside the nonsuit, the plaintiff may remove the record by writ of error into the Supreme Court for revision and review, in like manner and with like effect as he might remove a judgment rendered against him upon a demurrer to evidence." Penn. Stats. March 11, 1836, Chap. 34, § 7; March 11, 1875, Chap. 8; 2 Purdon's Digest (11th ed.) 1362, 1363. Under that statute, as expounded by Chief Justice Gibson, the judge can order a nonsuit only when all the evidence introduced, with every inference of fact that a jury might draw from it in favor of the plaintiff, appears to be insufficient in matter of law to sustain a verdict; and the defendant's motion for a nonsuit is equivalent to a demurrer to evidence, differing only in the judgment thereon not being a final determination of the rights of the parties, for if it is in favor of the plaintiff the case must be submitted to the jury, and if in favor of the defendant it is no bar to a new action. Smyth v. Craig, 3 Watts & Sergeant, 14; Fleming v. Insurance Co., Brightly, 102; Bournonville v. Goodall, 10 Penn. St. 133.[1]

[1] Bell, J. In Bournonville v. Goodall, 10 Pa. St. 133: "The defendant's plea is founded on the supposed conclusiveness of the judgment of nonsuit ordered by the judge on the trial of the first acts

It is true that a plaintiff who appears by the record to have voluntarily become nonsuit, cannot sue out a writ of error. United States v. Evans, 5 Cranch, 280; Evans v. Phillips, 4 Wheat. 73; Cossar v. Reed, 17 Q. B. 540. But in the case of a compulsory nonsuit it is otherwise; and a plaintiff, against whom a judgment of nonsuit has been rendered without his consent and against his objection, is entitled to relief by writ of error. Elmore v. Grymes, 1 Pet. 469; Strother v. Hutchinson, 4 Bing. N. C. 83; S. C. 5 Scott, 346; 6 Dowling, 238; Voorhees v. Coombs, 4 Vroom, 482.

There are many cases in the books, in which this court has held that a court of the United States has no power to order a nonsuit without the plaintiff's acquiescence. Elmore v. Grymes, above cited; Crane v. Morris, 6 Pet. 598, 609; Silsby v. Foote, 14 How. 218; Castle v. Bullard, 23 How. 172, 183. Yet, instead of overruling, upon that ground alone, exceptions to a refusal to order a nonsuit, this court, more than once, has considered and determined questions of law upon the decision of which the nonsuit was refused in the court below. Crane v. Morris and Castle v. Bullard, above cited.

The difference between a motion to order a nonsuit of the plaintiff and a motion to direct a verdict for the defendant is, as observed by Mr. Justice Field, delivering a recent opinion of

facias, in pursuance of the 7th section of the act of March 11, 1836. In its legal effect, as a flat bar to further proceedings under the mechanic's lien law, it is thought to be analogous to a judgment rendered upon a demurrer to the plaintiff's evidence; and, indeed, in Smythe v. Craige, 3 W. & S. 18, it was said a prayer for a nonsuit, under the statute, is effectively a demurrer to evidence, except that the judge cannot give judgment for the defendant, though he should think the nonsuit not grantable. But this very difference shows that the similarity between the prayer and the demurrer regards only the inferences that may be drawn from the evidence, and not the effect of the judgment consequent upon it. This distinction is luminously pointed out by the learned judge who first brought to notice the partial similitudes in an opinion delivered at *Nisi Prius*, in the case of Fleming v. Insurance Co. of Penna., 6 Pa. Law J. 373. The reasoning of the Chief Justice there, demonstrates that the legislature entertained no intent to confer upon the statutory nonsuit a quality unknown to the common law, and which might be productive of great harshness and injustice. It is not worth while to repeat it here, for, being adopted as illustrative of the conclusion arrived at by the whole court, for the information of the profession, its publication, in connection with this determination, will be directed."

this court, "rather a matter of form than of substance, except (that) in the case of a nonsuit a new action may be brought, whereas in the case of a verdict the action is ended, unless a new trial be granted, either upon motion or upon appeal." Oscanyan v. Arms Co., 103 U. S. 261, 264.

Whether a defendant in an action at law may present in the one form or in the other, or by demurrer to the evidence, the defense that the plaintiff, upon his own case, shows no cause of action, is a question of "practice, pleadings, and forms and modes of proceeding," as to which the courts of the United States are now required by the act of Congress of June 1, 1872, Chap. 255, § 5 (17 Stat. 197), re-enacted in § 914 of the Revised Statutes, to conform, as near as may be, to those existing in the courts of the state within which the trial is had. Sawin v. Kenny, 93 U. S. 289; *ex parte* Boyd, 105 U. S. 647; Chateaugay Co., petitioner, 128 U. S. 544; Glenn v. Sumner, 132 U. S. 152, 156.

It is doubtless within the authority of the presiding judge, and is often more convenient, in order to prevent the case from being brought up in such a form that the judgment of the court of last resort will not finally determine the rights of the parties to adopt the course of directing a verdict for the defendant and entering judgment thereon.

But the judgment of nonsuit, being a final judgment disposing of the particular case and rendered upon a ruling in matter of law duly excepted to by the plaintiff, is subject to be reviewed in this court by writ of error.

It was therefore rightly assumed by the counsel of both parties at the argument that the only question to be determined is of the correctness of the ruling sustaining the defense of *ultra vires* independently of the form in which that question was presented and disposed of.

SECTION 6. ARGUMENT OF COUNSEL.

DOUGLASS v. HILL.

29 Kansas, 527. [*1883.*]

BREWER, J. This was an action brought by the defendant in error, plaintiff below, to recover the value of a certain stock of goods claimed to have been taken and converted to his own use by defendant. Prior to May 2, 1881, the goods belonged to and

were in the possession of one J. L. Bowlden. On that day plaintiff claims to have purchased them. Thereafter the defendant, as sheriff of Butler county, seized them by virtue of a writ of attachment issued against said Bowlden. Therefore the question in the case was, whether the goods at the time of the levy by the sheriff were the property of said Bowlden; and this depends on the further question whether the sale to plaintiff was valid, or not. The dealings with Bowlden were had by Edwin Hill, the husband of plaintiff, who she claimed was acting as her agent. With this general statement of the case, we pass to the consideration of the particular questions presented. The action was tried before a jury, and at its close defendant claimed the right to argue the questions of fact to the jury, but the court refused to permit any argument. This ruling is alleged as the principal ground for reversal. The court in its instructions submitted to the jury a question of fact in these words: "If you find from the evidence that at the time of the conversion of the property the plaintiff was the owner of it, it will be your duty to find a verdict in her favor for the value of the property." Counsel insist that wherever a question of fact is submitted to a jury, counsel has a right to be heard in argument thereon; and while it is conceded that the court has a discretion in restricting the time to be occupied in such argument, claim that to refuse any argument is a denial of an absolute right, and manifest error. As a general proposition we think this is unquestionably true. A party to a law suit has a right to be heard, not merely in the testimony of his witnesses, but also in the arguments of his counsel. It matters not how weak and inconclusive his testimony may be, if it is enough to present a disputed question of fact upon which he is entitled to a verdict of the jury, he has a right to present in the arguments of his counsel his view of the case. This is no matter of discretion on the part of the court, but an absolute right of the party. Courts doubtless may prevent their time from being unnecessarily occupied by prolix arguments, and so may limit the time which counsel shall occupy. And if the restriction is a reasonable one in view of the questions involved, and the testimony presented, there will be no error.[1] (The State v.

[1] See Trice v. Ry., 35 Mo. 416, holding that it was not an abuse of discretion in that case to limit the argument to ten minutes. But in White v. People, 90 Ill. 117, it was held that a limit of five minutes in effect denied the right of argument.

Riddle, 20 Kas. 716.) But limiting the time of an argument and refusing to permit any argument at all, are entirely different matters. The one is the exercise of a discretion, the other is a denial of a right. Weeks on Attorneys at Law, pp. 209, 213, §§ 110, 115; Proffatt on Jury Trials, § 248; Garrison v. Wilcoxson, 11 Ga. 154; People v. Keenan, 13 Cal. 581; Commonwealth v. Porter, 10 Metc. 263; Commonwealth v. Austin, 7 Gray, 51; Wilkins v. Anderson, 11 Pa. St. 399; Dobbins v. Oswalt, 20 Ark. 619; Tobin v. Jenkins, 29 *id.* 151; Brooks v. Perry, 23 *id.* 32; Bertrand v. Taylor, 32 *id.* 470; Cory v. Silcox, 5 Ind. 370; State v. Page, 21 Mo. 257; Freligh v. Ames, 31 *id.* 253; Trice v. Rld. Co. 35 *id.* 416; Bierson v. Mahoney, 6 Baxter (Tenn.), 304; Coldwell v. Brower, 75 Ill. 516; Slate Co. v. Meyer, 8 Daly, 61; Millard v. Thorne, 56 N. Y. 402.

Not seriously disputing this proposition, counsel for defendant in error insists that when there is no evidence in the case, legally sufficient, from which a jury could legitimately find a verdict in favor of a party, the court may properly refuse any argument in behalf of such party to the jury, (Bankard v. Rld. Co., 34 Md. 197), and claims that here the testimony was all one way, and necessarily compelled the verdict which was in fact returned. It is common and correct practice to direct a jury to return a verdict in favor of a party when there is no testimony legally sufficient to justify a verdict against him. And in such cases it would be folly to permit argument for or against such direction. The counsel is doubtless right in this, and therefore we are compelled to examine the evidence. Yet as the court submitted a question of fact to the jury, we should presume that there was a question of fact to be determined by them. The court did not direct a verdict for the plaintiff, as it might and perhaps ought to have done, if the testimony compelled such a verdict. The action of the court is therefore against the claim of the counsel. * * *

HOGGETT v. EXLEY.

9 Carrington & Payne, 324. [*1839.*]

The declaration was on a charter party, by which the defendant undertook to provide a cargo of corn from Marseilles to England, in the ship Spring. There was no plea of the general issue,

but a special plea to the effect that after the making of the charter party, and before any breach of the contract, an agreement was made between the plaintiff and defendant, that a cargo of cotton should be substituted for the cargo of corn, and that it was so substituted, etc.

R. V. Richards, for the plaintiff, claimed the right to begin on the ground that he was entitled to damages for the breach of the contract.

Bompas, Serjt., for the defendant objected.—If the defendant succeeds there will be no damages to assess.

MAULE, J.—That argument would prove too much.

R. V. Richards.—Wherever the plaintiff claims unliquidated damages, which must of necessity compel him to call witnesses, he is entitled to begin. This bears no analogy to the cases where the plaintiff seeks to recover a sum certain.

Bompas, Serjt.—As the judges have laid down the rule, it is confined to personal injuries. I have heard Mr. Baron Parke say so most distinctly. And it is so laid down in Carter v. Jones (6 C. & P. 64). There was also a case as to the warranty of a horse, which was tried before Mr. Justice Coleridge at the last Bristol Assizes, in which a similar decision was given.

MAULE, J.—I wish there was some rule which was imperative and excluded all discretion on the subject. But there is not, and it must be left to the judge to decide in each particular case, whether a substantial question is the assessment of damages, and if it is, the plaintiff ought to begin.[1] And I think in this case that he ought to begin.

R. V. Richards then stated the plaintiff's case, and there was ultimately a verdict for the plaintiff.—Damages £225.

C. B. & Q. R. R. Co. v. BRYAN.

90 Illinois, 126. [*1878.*]

Mr. Justice WALKER delivered the opinion of the court:

This was an action for an assault and battery, by appellee against the railroad company, whilst appellee was a passenger on a train owned and run by appellant on its road at Sagetown.

[1] Accord: Mercer v. Whall, 5 Ad. & El. (N. S.) 447.

It is averred that the conductor in charge of the train committed the assault and battery.

To the declaration were filed two pleas of justification. * * * To each of these pleas a replication was filed, and issue joined to the country. The cause was tried by the court and a jury, and resulted in a verdict in favor of plaintiff, and the assessment of his damages at $500. A motion for a new trial was entered, but was overruled by the court, and judgment was rendered on the verdict, and defendant appeals. * * *

There being no general issue or any traverse of the declaration filed, but simply pleas of confession and avoidance, appellant, before the trial commenced, moved the court to allow it to have the affirmative of the trial and argument, but this the court refused and an exception was taken, and appellant assigns error thereon. As a general rule, in argument or other contests it devolves on the person holding the affirmative to establish his proposition. Until that is *prima facie* done, the person holding the negative is required to do no act in reference to the issue. Here, had appellant introduced no evidence, appellee would, under the issue, have been entitled to judgment. He was bound to introduce no evidence as to the commission of the act complained of, until appellant proved a *prima facie* justification of the act for which it was sued. Had appellant introduced no evidence, then appellee might have introduced evidence to show the nature and extent of the injury, precisely as in case of a default, for the purpose of enabling the jury to estimate the damages.

According to the doctrine of Harvey v. Ellithrope, 26 Ill. 418, and Kells v. Davis, 57 *id.* 261, under these issues appellant was entitled to hold the affirmative of the trial and argument, and it should not have been deprived of the right.

For the errors indicated, the judgment of the court below is reversed and the cause remanded.

Judgment reversed.

CUNNINGHAM v. GALLAGHER.

61 Wisconsin, 170. [*1884.*]

Appeal from the Circuit Court for Dane county.

The action is for slander. The complaint charges, in the usual form, that, in the presence and hearing of divers other persons,

the defendant maliciously spoke of and concerning the plaintiff, certain false and defamatory words therein stated. The answer of the defendant admits the speaking of the words charged, but alleges that they were true. Also, that the defendant had good reason to believe and did believe they were true.

After the jury called to try the case were sworn, the defendant claimed that he had the affirmative of the issue, and was entitled to the opening and closing arguments. The court held otherwise.

The trial resulted in a verdict for plaintiff, assessing his damages at $500. A motion for a new trial was denied, and judgment for the plaintiff entered pursuant to the verdict. The defendant appeals from the judgment.

LYONS, J. A reversal of the judgment is claimed on two grounds: (1) because the court denied the right of defendant's counsel to open and close the argument; and (2) because the court denied the motion for a new trial. * * *

The question as to which of the parties in this action held the affirmative, within the meaning of Circuit Court Rule XXIII, has, however, been very fully and ably argued by counsel, and they have cited numerous cases bearing upon it. Inasmuch as the question may, and probably frequently does, arise in practice, we deem it proper to determine it here, although, for the reason just stated, it scarcely arises on this record. It was formerly held in England that in actions to recover unliquidated damages, if the defendant confessed the cause of action and set up matter in avoidance of it, he was entitled to open and close the argument, notwithstanding the burden still remained with the plaintiff to prove the facts upon which he relied to recover the damages he claimed. But the practical operation of this rule was so unsatisfactory that in 1833 the judges, by resolution, changed it, so that thereafter, in such cases, the plaintiff was, and still is, entitled to open and close. The rule is not a common law rule in that sense which requires an act of parliament or of the legislature to change it, but is merely a rule of practice within the control of the courts.

With us the practice is different in different states. Some of the courts have adopted the old English rule, and some the modern rule established by the resolution of the judges. In this state the practice has not been settled by this court, and we are at liberty to adopt either rule. We think the modern English

rule is supported by the better reasons. It is difficult to understand how it can logically be said that the defendant has the affirmative of the issue in a given case, when proof is required of the plaintiff in the first instance to entitle him to the damages which he claims. The amount of his damages remains in issue, even though the defendant confesses the cause of action upon which the claim for damages is founded, and the burden remains with the plaintiff to prove the facts connected with the cause of action which will enable the jury to determine whether he is entitled to the amount claimed.

For the reasons above suggested we hold that when, in an action to recover unliquidated damages, the defendant confesses the cause of action and pleads in avoidance thereof, the affirmative is with the plaintiff, and, under Circuit Court Rule XXIII, the latter is entitled to open and close the arguments to the jury.[1]

By the Court—Judgment affirmed.

ST. LOUIS RY. CO. v. JOHNSON.

74 Kansas, 83. [*1906.*]

Sarah E. Johnson brought an action against the plaintiff in error to recover for the death of her son, William A. Johnson, a brakeman, who was killed while in the employ of the railroad company near Scullin, in the Indian Territory. She recovered a verdict and judgment for $2,000, and the company prosecutes this proceeding in error. * * *

PORTER, J. * * * At the close of the evidence counsel for plaintiff waived the opening argument. Defendant thereupon contended that by waiving the opening argument counsel also waived the right to make a closing argument, and upon the court's permitting counsel for plaintiff to reply to the argument of defendant an exception was saved, and it is claimed that the court erred. (Railroad Co. v. Vanzego, 71 Kan. 427, 80 Pac. 944.) Defendant had the right to submit the case to the jury without argument when plaintiff waived the opening statement,

[1] Accord: Buckley v. Knapp, 48 Mo. 152 (action for libel and a plea of justification only).

but, having elected to argue the case to the jury, was not in a position to object to plaintiff's closing the argument by a reply.[1] The party on whom rests the burden of proof has the right to open and close the argument; he can waive either of these, or both. By waiving the opening he waives the right to close, provided the other party also waives his argument. This is the orderly method of procedure universally adopted by the courts. The case cited does not go to the extent claimed for it by the plaintiff in error.

Other errors are complained of which we do not consider material or of sufficient weight to require mention. We find no substantial errors in the record, and the judgment is affirmed.

All the justices concurring.

PRENTIS v. BATES.

93 Michigan, 234. [*1892.*]

MONTGOMERY, J. A rehearing was ordered in this case after full consideration, the members of the court who took part in the former decision being convinced that the questions involved deserve re-examination. This rehearing has been had, and we feel constrained to depart from some of the conclusions stated in the former opinion, which, while having the support of respectable authority, we find to be in conflict with some of the former rulings of this court, which for the time escaped attention. For convenience we will consider the questions involved in the same order adopted in the former opinion.

1. The first question considered was whether counsel for the contestants abused his privilege in his opening statement to the jury. On the former hearing the sitting members of the court were impressed with the view that the trial judge had not sufficiently restricted contestants' counsel in this case, but a fuller argument and examination have convinced us that the statements of counsel, both as to the propositions of law contended for in his opening, and as to the facts which he expected to prove, were

[1] Accord: Hickman v. Layne, 47 Neb. 177. Compare Ry. v. Garrity, 63 N. J. L. 352.

made in the utmost good faith. The will offered for probate was made in favor of the relations of decedent's husband, to the exclusion of her own nieces and nephews, and counsel for contestants referred to this fact, and claimed that it was an unnatural will, and that in such cases the law will draw an inference that the will was procured by fraud; and also argued, in the same connection, that the burden of proof in such cases would rest upon the proponents. The question of undue influence was afterwards eliminated from the case by the trial judge. It is unnecessary to determine whether the contestants' position on the law of the case was wholly sound or not, as counsel had the right, under the rulings of the court, to state in good faith his claims as to the law, in so far as it was necessary to give the jury an understanding of his theory. As was said in Fosdick v. Van Arsdale, 74 Mich. at page 305:

"Counsel have the right, both in opening the case to the jury, before the testimony to support their case is offered, and when closing the argument, after the testimony is in, to state to the jury that they claim the law to be thus and so."

This ruling, it is believed, is in accord with the general understanding of the profession, and certainly is no departure from the practice which has obtained at the circuit from the time of the adoption of the present rules of court. This right would be nothing more than a mere shadow, or, worse, a dangerous snare, if, after counsel has taken his position in good faith, he is to be made the guarantor of his views of the law on every question presented, and, if in the end it should be found that he is mistaken on some point of minor importance, the judgment in his favor is to be vacated for this reason. It must be an exceedingly plain case of an abuse of privilege which will justify the setting aside of the verdict on the ground of improper opening either in statement of the law or fact. Nothing short of bad faith or a gross misconception of what is admissible, resulting in bringing to the attention of the jury matters wholly irrelevant, and of a nature calculated to create so profound an impression that the charge of the court cannot eliminate the prejudice produced, will justify an appellate court in vacating a judgment on such grounds; and, in determining whether such an error has been committed, it is believed to be entirely safe to credit the jury with at least average intelligence. People v. Gosch, 82 Mich. 22; Porter v. Throop, 47 id. 313; Campbell v. Kalamazoo, 80 id. 655.

Tested by this rule, we do not think any error was committed by counsel in his opening, either in stating the law or facts which he expected to prove. The statement of the facts expected to be proved by Dr. Gallagher, quoted in the former opinion, was termed "extravagant."[1] A careful examination of the testimony actually introduced convinces us that the contestants made the proposition in good faith, and, although the proof of what was said was not as full as the opening statement, yet the substance of what was stated, namely that Mrs. King mistook pills for flies, and mistook a fly for the pill, was testified to by the witness. * * *

HELLER v. PULITZER PUB. CO.

153 Missouri, 205. [*1899.*]

MARSHALL, J. * * * The defendant argues that if the jury are the judges of the law in a libel case, counsel have a right to read law books to the jury, and that the trial court erred in refusing appellant's counsel the right to do so in this case, and in support of this contention counsel refers to Harvey v. State, 40 Ind. 516; Stout v. State, 96 Ind. 407, and Hannah v. State, 11 Lea, 201. These were all criminal cases, and the Tennessee case alone was a criminal libel case. It is argued, however, that in all cases where the jury are the judges of the law as well as the fact it is a substantial right of counsel to read law books to the jury, and in support of this counsel refers to 19 Am. and Eng. Ency. of Law (1 Ed.), p. 620, and the cases there cited, and to 1 Thompson on Trials, § 945.

We are of opinion, however, that as under Fox's act the court or judge was expressly given the right to "give their or his opinion or direction to the jury on the matter in issue between the king and the defendant, or defendants, in like manner as in other criminal cases," so under our Bill of Rights it is the province of the court to give directions to the jury, that is, to define in general terms the law of libel, but not to command a verdict for the plaintiff, and as by section 2188, Revised Statutes, 1889, the

[1] For an illustration of an improper opening statement, see Scripps v. Reilly, 35 Mich. 371.

court is charged with the duty in civil cases of giving, in writing, all the instructions covering the law applicable to the matters in issue, which the parties ask, and the court thinks proper, or which the court may give of its own motion. It was never intended by the framers of our constitution in adopting the Fox act, to permit the practice of getting the law before the jury in any other manner than by instructions asked of and given by the court. (Sparf v. U. S., 156 U. S. 51.) Allowing counsel to read law books to the jury would not only tend to confuse the jury, but might present the unseemly spectacle of counsel trying to convince the jury, by what some author says, whose ideas are not followed in this State, or by some decision of a court of some other State where the adjudications are not in accord with ours, that the directions of the court were not the law; and thus the due and orderly administration of justice, so necessary to be observed, would be turned into a farce and perhaps an insult to the judge of the trial court.

Whatever may be the practice in other States, it is not permissible in our State to read law books to a jury in any kind of a case, and the trial court did not err in stopping counsel for defendant in this case, when he attempted to do so.[1]

For the error in giving the mandatory instruction to find for the plaintiff, the judgment of the Circuit Court is reversed, and the case remanded.

All concur.

[1] Shaw, C. J., in Com. v. Porter, 10 Metcalf, 263, "Considering the latitude which has been allowed in this Commonwealth, by a long course of practice, and the difficulty of drawing an exact line of distinction between that full statement and exposition of his views of the law, which counsel may properly make in a general address to the court and jury, upon the questions embraced in the issue, and involved in a general verdict, and an address to the jury separately upon questions of law, we are of opinion that a party may by his counsel address the jury upon questions of law, subject to the superintending and controlling power of the court to decide questions of law, by directions to the jury, which it is their duty to follow. In ordinary cases, such directions to the jury, upon the questions arising in the cause, are not given until the parties, by their counsel, have submitted their respective views of the law and the facts, in an argument to the court and jury."

DOWDELL v. WILCOX.

64 Iowa, 721. [*1884.*]

This action involves the title and ownership of two horses and a wagon. The property was levied upon by the defendant, who is sheriff, by virtue of an execution against Thomas Dowdell, the husband of the plaintiff. The plaintiff claims that she is the owner of the property. The defendant claims that whatever title the plaintiff has in the property is fraudulent as to the creditors of the husband. There was a trial by jury, verdict and judgment for the plaintiff. Defendant appeals.

ROTHROCK, C. J. * * * Accompanying the motion for a new trial, the defendant filed an affidavit of one of his counsel, setting forth what is claimed to be improper conduct of plaintiff and her counsel during the argument of the case to the jury. It is in effect claimed that counsel made unwarranted statements to the jury in his closing argument; that he misstated the law, and appealed to the prejudice of the jury in the plaintiff's behalf, because she is a widow, and denounced the judgment creditors as leeches and oppressors of poor women and widows; and that plaintiff sat near, facing the jury, and, when counsel made sympathetic appeals to the jury because her husband had been a soldier and she was now a widow, she would weep, or pretend to weep, etc.

We do not think the judgment should be reversed for this alleged misconduct of counsel and plaintiff. Indeed, we are not prepared to say that there was a departure from what ought to be regarded as fair and legitimate in the trial of a cause to a jury. Great latitude is allowed in appealing to the sympathy of the jury in the arguments of the counsel. That, and the widow in tears, are a kind of stage performance which courts cannot very well, and perhaps ought not to attempt to, control.[1] Besides, the record does not show that any objection was made by counsel for appellant to the conduct of which he now complains.

Affirmed.

[1] For illustrations of improper appeals to prejudice against the defendant, see McDonald v. People, 126 Ill. 150; Neff v. Cameron, 213 Mo. 350.

ROLFE v. INHABITANTS OF RUMFORD.

66 Maine, 564. [*1877.*]

Case for injury to plaintiff's wife through defective town way January 15, 1874.

The case was on trial nearly a week and resulted in a verdict for the plaintiffs of $275, which they moved to set aside for inadequacy, as against law and evidence. They also filed the following bill of exceptions:

"E. G. Harlow, one of the counsel of the defendants, in his closing argument to the jury at the trial of said case, was permitted by the court against the seasonable objection and protest of the counsel for the plaintiffs, to state to the jury the amount of damages recovered in other cases than the one on trial, concerning which no testimony had been offered and which was not in any law report, and to declare as matter of fact that said cases were identical or similar to the one then on trial; and to argue that the damages in the case on trial should in no event be greater than the damages found by the jury in the cases so commented upon; and further, that the cause of action in the case on trial had probably passed out of the control of the plantiffs in the case, and of the administrator of Elizabeth S. Rolfe, and to state to the jury certain alleged facts as to the death by consumption of other persons than the said Elizabeth S. Rolfe, alleged by said Harlow to be within his knowledge, but concerning which no testimony was offered; and to argue to the jury that the counsel for plaintiffs came from another county, and had appeared in other cases against other towns in Oxford county, and had recovered damages therein against said towns, although no evidence was offered touching the same, which statements and arguments the plaintiffs' counsel seasonably requested the court to exclude, but which the court declined to exclude. The presiding judge failed to give any instructions touching said acts, arguments and statements of alleged facts done and made by said counsel for the town, except that the facts were to be settled from the testimony in the case given under oath."

VIRGIN, J. We think the learned judge before whom this case was tried erred in permitting the counsel for the defendants, against the seasonable interposition of the plaintiffs' counsel, to

proceed with his argument upon asserted facts not in evidence and having no legitimate pertinency to the issue.

It is indispensable to the orderly course of judicial procedure and an impartial administration of the laws, that those officially engaged in the trial of causes shall faithfully observe the established rules of practice. The constitution guarantees to the parties of a cause the right of a trial by a jury duly constituted, and to have the trial conducted according to the course and usage of the common law and the long established rules of judicial proceedings; and whenever these rules are substantially violated, the right of the parties litigant is to that extent denied.

The law, with great care, prescribes numerous rules for determining the admissibility of the facts to be submitted to the jury, vigilantly and scrupulously excluding from their consideration all such as do not come within the rules. These rules require among other things that the facts shall be material and pertinent to the issue; and that, when not contained in documents, they shall be delivered under the sanctions of an oath, and their truthfulness tested by cross-examination. Even a juror's own personal knowledge of pertinent facts cannot be considered by himself and his fellows in making up their verdict unless it take on the form of testimony by being delivered from the stand by the juror under oath as a witness. Otherwise, testimony which might influence a verdict would escape the ordeal of cross-examination and discussion. As a sequence of these rules, one of the essential elements in the trial by jury is that they are sworn to render their verdict in accordance with such facts only as are adduced at the trial; and whenever it is rendered without evidence, against evidence or upon incompetent evidence which may have come to the knowledge of the jurors by direct ruling in the court room, or by accident or mistake outside of the court room, it is liable to be set aside and a new trial granted.

So the courts have usually been very firm, whenever occasion has required, in confining counsel within proper and reasonable bounds to whatever is pertinent to the matter on trial. Statements of alleged facts not adduced in evidence, and comments thereon are irrelevant, not pertinent and are therefore clearly not within the privilege of counsel; and any such practice on the part of counsel should be promptly checked, especially when objected to by the other side. Berry v. State, 10 Ga. 511; Mit-

chum v. State, 11 Ga. 615; Bullock v. Smith, 15 Ga. 395; Dickerson v. Burke, 25 Ga. 225; Wightman v. Providence, 1 Clifford, 524; Tucker v. Henniker, 41 N. H. 317.

In this connection we adopt the views of the courts of Georgia, and New Hampshire expressed in the following forcible and felicitous language:

"It is irregular and illegal for counsel to comment upon facts not introduced in evidence before the jury, and not legally competent as evidence. The counsel represents and is a substitute for his client; whatever, therefore, the client may do in the management of his cause may be done by his counsel. The largest and most liberal freedom of speech is allowed, and the law protects him in it. The right of discussing the merits of the cause, both as to the law and the facts, is unabridged. The range of discussion is wide. He may be heard in argument upon every question of law. In his addresses to the jury it is his privilege to descant upon the facts proved, or admitted in the pleadings; to arraign the conduct of the parties; impugn, excuse, justify or condemn motives, so far as they are developed in evidence, assail the credibility of witnesses, when it is impeached by direct evidence, or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance on the stand, or by circumstances. His illustrations may be as various as the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wings to his imagination.

"To his freedom of speech, however, there are some limitations. His manner must be decorous. All courts have power to protect themselves from contempt, and indecency in words or sentiments is contempt. This is a matter of course in the courts of civilized communities, but not of form merely; for no court can command from an enlightened public that respect necessary to an efficient administration of the law, without maintaining, in its business proceedings, that courtesy, dignity, and purity which characterize the intercourse of gentlemen in private life.

"When counsel are permitted to state facts in argument, and to comment upon them, the usage of courts regulating trials is departed from, the laws of evidence are violated, and the full benefit of trial by jury is denied. It may be said in answer to these views that the statements of counsel are not evidence; that the court is bound so to instruct the jury, and that they

are sworn to render their verdict only according to the evidence. All this is true; yet the necessary effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances; and if they in the slightest degree influence the finding, the law is violated, and the purity and impartiality of the trial tarnished and weakened. If not evidence, then manifestly the jury have nothing to do with them, and the advocate has no right to make them. It is unreasonable to believe the jury will entirely disregard them. They may struggle to do so and think they have done so, and still be led involuntarily to shape their verdict under their influence. That influence will be greater or less, according to the character of the counsel, his skill and adroitness in argument, and the force and naturalness with which he is able to connect the facts he states with the evidence and circumstances of the case. To an extent not definable, yet to a dangerous extent, they unavoidably operate as evidence which must more or less influence the minds of the jury, not given under oath, without cross-examination, and irrespective of all those precautionary rules by which competency and pertinency are tested." NESBIT, J., in Mitchum v. State, *sup.* FOWLER, J., in Tucker v. Henniker, *sup.* See also Baldwin's Appeal (Conn.), 3 L. & Eq. Rep. 409.

Whether or not the verdict is so inadequate as to warrant us in setting it aside upon the motion, we have not considered it necessary to express an opinion. In actions of this nature, the principles upon which damages are assessed are very indefinite at best, and therefore very much is necessarily left to the good judgment and sound discretion of the jury. Hence, when, as in the case at bar, the testimony is conflicting on several points, courts are very reluctant to interfere with the verdict on the alleged ground of excessive or inadequate damages, except when it is so large or so small as to show that it is the result of perverse judgment or gross error, or that the jury had acted under undue motives or misconception. Therefore we do not pass upon the motion. But inasmuch as that part of the closing argument to which exceptions are alleged was clearly illegal and violative of the rights of the plaintiffs, and urged by an experienced counsel of high character and acknowledged ability, must have necessarily had more or less influence upon the minds of the jury, notwithstanding the instruction of the presiding justice

that the case must be settled from the sworn testimony, we think the exceptions must be sustained.[1]

Exceptions sustained.

BAKER v. CITY OF MADISON.

62 Wisconsin, 137. [*1885.*]

LYON, J. This action was brought to recover damages for injuries received by the plaintiff, alleged to have been caused by a defect in a gutter at the intersection of certain streets in the defendant city, by reason of which a wagon loaded with hay upon which the plaintiff was riding was overturned, inflicting the injuries complained of. The case has been tried three times. The first trial was had before Judge STEWART, in the Dane County Circuit Court, and resulted in a verdict for $3,000 in favor of the plaintiff. That court set aside the verdict on the ground that the testimony showed conclusively that the plaintiff was guilty of negligence which contributed directly to the injury.

The place of trial was then changed to the Jefferson County Circuit Court, and was there tried before the late Judge CONGER. On that trial the plaintiff had a verdict for $2,500, for which sum judgment was entered against the defendant city. An appeal was taken, and this court reversed such judgment, for the reason that the evidence showed conclusively that the gutter where the accident happened was in proper repair. 56 Wis. 374.

The cause was then remanded, and again tried in the same court before Judge BENNETT, and the trial resulted in a verdict and judgment for the plaintiff for $6,000. This appeal is by the defendant from such judgment. * * *

III. It is maintained by counsel for defendant that counsel for the plaintiff committed several improprieties on the trial, which bring the case within the rule of Brown v. Swineford, 44 Wis. 282, and hence that the judgment ought to be reversed.

[1] See also Evans v. Trenton, 112 Mo. 390.

And so where evidence is admitted for one purpose only, but is used in argument by counsel for other purposes. Waldron v. Waldron, 156 U. S. 361.

That rule, as formulated by the late Chief Justice RYAN, is that "it is error sufficient to reverse a judgment, for counsel, against objection, to state facts pertinent to the issue and not in evidence, or to assume *arguendo* such facts to be in the case when they are not. * * * And if counsel persevere in arguing upon pertinent facts not before the jury, or appealing to prejudices foreign to the case in evidence, exception may be taken by the other side, which may be good ground for a new trial, or for a reversal in this court." We are not disposed to question or in any degree weaken the authority of that case. We believe it rests upon sound principles, essential to the due administration of justice, and should not be disturbed. The rule there laid down will be promptly applied to every case fairly within it which may come before this court. Is this such a case?

The charge of misconduct here is made up of several specifications. As to some of them, no objection was made or exception taken. These need not be stated, because they are clearly not within the above rule.

One of the charges is that Mr. Welch, one of the attorneys for the plaintiff, when testifying as a witness, made answer to a question, a portion of which answer was stricken out by the court as improper, and afterwards, in another answer, repeated the objectionable words, which were again stricken out. There is also another specification of the same character. These relate to the conduct of Mr. Welch as a witness, not as counsel. If a witness is guilty of misconduct on the stand, the court should admonish, and, if necessary, punish him therefor—not the party whose witness he is. The court was not asked to do so in the present case.

The most objectionable remarks made on the trial by counsel for the plaintiff, to which objection was taken, were made in response to an objection to testimony which such counsel was seeking to introduce. He said: "I am careful not to get error into the case. If my client was a rich man, I should like to litigate this matter for the next twenty-five years, and I think it would give me a good support; but my client is poor, and we live in Minneapolis, and every time we come down here it costs him a hundred dollars." The remark that plaintiff was a poor man, and the allusion to the expense of the litigation in connection with that fact, if unproved, would have been improper, not because such statement was pertinent to the issue—for it

was not—but because it might have tended unduly to influence the minds of the jurors in favor of the plaintiff, which, on principle, is as objectionable as prejudice against the defendant. But we think it a fair inference from the testimony that the plaintiff is not rich. He was a farm laborer, working for others for hire in summer, before and after he was injured, and sometimes taught school in the winter. He had no mechanical trade. It is not unreasonable to infer from his condition and employment that he was poor. The rule we are considering does not prohibit a statement by counsel of a fact proved in the case, even though such fact is outside the issue. We perceive nothing else objectionable in what counsel then said. The balance of it seems to have been mere harmless pleasantry.

When objection was made to the remarks now being considered, counsel withdrew them, as far as he could do so, by saying that he took them back. We do not think that the consequences of an improper statement by counsel, which comes within the rule of Brown v. Swineford, can be so easily averted. No importance is given to this "taking back" process, and it would scarcely save the judgment had the rule above stated been violated in the first instance.[1]

We conclude that none of the specifications of misconduct by counsel bring the case within the rule of Brown v. Swineford, *supra*. * * *

SECTION 7. INSTRUCTIONS.

(a) *Questions for the judge or jury.*

MANWARING v. HARRISON.

1 Strange, 508. [*1722.*]

Upon the 17th of September (being Saturday), about two o'clock in the afternoon, Harrison gave to Manwaring in payment a note for £100 by Mitford and Mertins, goldsmiths, dated 5th of September, payable to Harrison or order. The same afternoon Manwaring pays away the note to J. S.; Mitford and Mertins paid

[1] The error is usually corrected by a withdrawal of the improper statements, followed by proper direction on the subject by the judge. State v. Hack, 118 Mo. 92.

all Saturday and Monday, and on Tuesday morning, as soon as the shop was open, and before any money paid, J. S. came and demanded the money, but Mitford and Mertins stopped payment; Manwaring paid back the money to J. S. and demanded it again of Harrison, who, refusing to pay it, an action was brought. And on non assumpsit the chief justice told the jury that giving the note is not immediately payment, unless the receiver does something to make it so by neglecting to receive it in a reasonable time, by which he gives credit to the maker of the note. He left it to them whether there had been any neglect, and observed that the note was payable to Harrison, who had kept it eleven days, and probably would not have demanded it sooner than Manwaring did, it appearing the goldsmiths were in full credit all the while. The jury desired they might find it specially, and leave it to the court whether there was a reasonable time; but the chief justice told them they were judges of that; whereupon they found *pro def.* and declared it as their opinion that a person who did not demand a goldsmith's note in two days took the credit on himself.[1]

TINDAL v. BROWN.

1 Term Reports, 167. [*1786.*]

Indorsees of a promissory note against the indorser.

This cause first came on to be tried at the sittings after Easter term, 1785, before Lord MANSFIELD, at Guildhall, when the jury found a verdict for the plaintiffs. On a motion for a new trial in last Trinity term the facts appeared to be these: that on the 21st of August, 1784, the note in question was made by one Donaldson for £35 payable six weeks after date; that on the 5th October, 1784, the day on which the note became due, allowing for the three days grace, one Howell (the plaintiff's clerk) called on Donaldson at ten in the morning, and, not finding him at home, he left word that the note was due, and desired Donaldson would send for it at his master's where it lay and take it up; that on the next day, Wednesday, the 6th of October, he

[1] For the modern rule on this subject, see Bank v. Zimmerman, 185 N. Y. 210 (1906).

called again on Donaldson, who told him he would take it up that day within the banking hours, which were from 9 to 4 o'clock; that the note not being taken up that day, he called again on Donaldson on Thursday, the 7th, and not finding him at home, he was sent to the defendant Brown to tender the note, who refused to pay it, saying the plaintiffs had made it their own. Donaldson proved at the trial that immediately on his parting with Howell on Wednesday, the 6th, he went to Brown's house, and not finding him at home he left a message with his wife that the note was due, that he (Donaldson) could not pay it, and desired that Brown would take it up, adding that he would make it good to him.

All the parties lived at Bristol within twenty minutes walk of each other.

After argument by Lee and Morgan, for the plaintiffs, and Cowper and Baldwin for the defendant, the court delivered their opinion to the following effect:

Lord MANSFIELD, Ch. J. On full consideration, I am now decidedly of opinion that there ought to be a new trial. It is of great consequence that this question should be settled. Certainty and diligence are of the utmost importance in mercantile transactions. It is extremely clear that the holder of a bill, when dishonored by the acceptor, must give reasonable notice to the drawer or indorser. What is reasonable notice is partly a question of fact, and partly a question of law. It may depend in some measure on facts; such as the distance at which the parties live from each other, the course of the post, etc. But wherever a rule can be laid down with respect to this reasonableness, that should be decided by the court, and adhered to by every one for the sake of certainty. I cannot form to myself an idea of the ground on which the jury went in giving this verdict. Did they conceive the rule to be that the holder might delay giving notice for two days, or what other time did they mean to allow him? Here an earlier notice might certainly have been given, as all the parties lived within twenty minutes walk of each other. The bill was dishonored on the 5th, the clerk saw the maker on the 6th, and gave him time during the banking hours of that day; and the plaintiffs did not go at 4 that afternoon, but waited till the next day. It has been held (*vide* Dougl. 497) that where the party liable does not

live in the same place, the holder must write by the next post after the bill is dishonored. It was well observed by the counsel that the juries were obstinate in the case of Metcalf and Hall (Tr. 22 Geo. 3 B. R.), where they struggled so hard, in spite of the opinion of the court, to narrow the rule, that they held you must in certain cases demand payment on a banker's draft within an hour. Here the struggle is to give a greater latitude than is necessary. It was once doubted (V. Bull. N. P. 274, 276) whether notice within fourteen days was not sufficient. For the sake of diligence and certainty, I am of opinion that there should be a new trial.

WILLES, J. I agree that there ought to be a new trial. New credit was given to the maker on the 7th; the plaintiffs' clerk went first to Donaldson to demand the bill of him, and after that they sent it to the defendant. As to the notice, I cannot consider the notice given by the maker equal to that given by the indorser. The plaintiffs have not acted with legal diligence.

ASHURST, J. It is of dangerous consequence to lay it down as a general rule, that the jury should judge of the reasonableness of time. It ought to be settled as a question of law. If the jury were to determine this question in all cases, it would be productive of endless uncertainty. The next day at the most is as long as is necessary in a case circumstanced like this. If the parties live at a small distance, this is sufficient time; if at a greater, they should write by the next post. Notice means something more than knowledge; because it is competent to the holder to give credit to the maker. It is not enough to say that the maker does not intend to pay, but that he (the holder) does not intend to give credit. In the present case there is no notice; for the party ought to know whether the holder intends to give credit to the maker, or whether he intends to resort to the indorser.

BULLER, J. The numerous cases on this subject reflect great discredit on the courts of Westminster. They do infinite mischief in the mercantile world; and this evil can only be remedied by doing what the court wished to do in the case of Metcalf and Hall by considering the reasonableness of time as a question of law and not of fact. Whether the post goes out this or that day, at what time, etc., are matters of fact; but when those facts

are established, it then becomes a question of law on those facts what notice shall be reasonable.[1] * * *

MACBEATH v. HALDIMAND.

1 Term Reports, 172. [*1786.*]

This was an action upon promises against the defendant, as agent, for work and labor, etc.

Plea—the general issue.

The cause was tried at the sittings after last Hilary term before BULLER, Justice, when a verdict was found for the defendant by the direction of the judge.

Upon a motion for a new trial by Cowper, the following facts appeared from the report:

In the year 1779 the defendant, being Governor of Quebec, appointed Captain Sinclair to the command of a fort called Michilimakinac, situated upon Lake Huron, in the Province of Canada.

On the 17th of August, 1779, the defendant transmitted certain instructions to Sinclair respecting the government of the fort, in which he said:

"You are to pay great attention to the Indians resorting to Michilimakinac, or furnished with necessaries from thence.

[1] In Scott v. Lifford, 9 East, 347 (1808), a bill of exchange had been presented for payment by plaintiff's banker on June 4th, and returned on June 5th to the plaintiff, who posted a notice of dishonor to defendant on June 6th. The trial judge left it to the jury to determine whether the notice had been given in a reasonable time. There was a verdict for plaintiff and defendant moved for a new trial.

LORD ELLENBOROUGH, C. J., said, I cannot say that the holder on the return of the bill dishonored to him is bound, *omissis omnibus aliis negotiis*, to post off immediately with notice: if reasonable diligence has been used, it is sufficient.

GROSS, J. Whether due diligence has been used is a question of law; but judges may take the opinion of a jury as to what is convenient in the manner of giving notice.

LE BLANC, J. It cannot be contended that a banker ought to give notice of the dishonor to any but his customer for whom he held the bill: and I cannot rule that the holder of a bill may not avail himself of the conveyance by the two-penny post.

Rule refused.

Endeavor to preserve them in good humor, and attach them by every means in your power to the king's interest."

In a further part of the same instructions he added:

"You will draw bills of exchange for defraying the contingencies incident to that post in the manner practised by Major De Peyster (an officer on whom that command had been before conferred), taking care to moderate and reduce those expenses, as far as can be done without injuring the king's service."

For some time Sinclair employed one Grant to distribute presents among the Indians, and to procure military stores, etc., for the use of the garrison; and, to defray these and other expenses, drew bills of exchange upon the governor, according to his instructions. When these accounts came to the defendant he made objections to several of the articles as unnecessary and exorbitant; and soon after recommended the plaintiff to Sinclair by a letter dated the 16th May, 1782, of which the following is an extract: * * * [Then follows an extended correspondence between the parties on the subject of furnishing supplies, and in regard to the plaintiff's bills for supplies furnished.]

BULLER, Justice, after reporting the above facts, said that he had been of opinion at the trial, that, the goods in question having been supplied for the use of government, and the defendant not having personally undertaken to pay, the plaintiff ought to be nonsuited. That it appeared to him that the plaintiff had acted with the defendant solely in the character of commander-in-chief, considering him as the agent of government. That all the letters imported it to be a transaction on the part of government; and that the accounts confirmed it. But the plaintiff's counsel appearing for their client when he was called, he left the question to the jury, telling them that they were bound to find for the defendant in point of law. And upon their asking him whether, in the event of the defendant's not being liable, any other person was, he told them that was no part of their consideration; but, being willing to give them any information, he added, that he was of opinion that, if the plaintiff's demand were just, his proper remedy was by a petition of right to the crown. On which they found a verdict for the defendant.

The rule for granting a new trial was moved for on the misdirection of the judge upon two points:

First, that the defendant had by his own conduct made himself personally liable, which question should have been left to the jury.

Secondly, that the plaintiff had no remedy against the crown by a petition of right, on the supposition of which the jury had been induced to give their verdict.

Lord MANSFIELD, Ch. J. The only question before the court is, whether the defendant be liable or not in this action? If he be, the plaintiff must recover; if not, no consideration respecting the plaintiff's remedy against any other party can induce the court to make him so.

There is no color to say that he is liable in his character of commander-in-chief. * * *

In the present case it was notorious that the defendant did not personally contract; the plaintiff knew, at the time that he furnished the stores, that they were for the use of government; and he afterwards made government debtor in his bills.

But it has been urged that the defendant made himself liable after the debt was contracted. In my opinion there is no ground for such an argument. The evidence does not warrant it.

Then it was objected, that whether the defendant had made himself liable or not was a question which ought to have been left to the jury to decide. But there was no evidence which was proper for their consideration; for the evidence consisting altogether of written documents and letters which were not denied, the import of them was matter of law and not of fact. Therefore I am of opinion that the verdict should stand.

WILLES, J. I think, under all the circumstances of the present case that the defendant is not personally liable. The goods were furnished for the use of the crown; government was made debtor; and all the letters speak of the transaction as having been considered in that light. Then if the defendant were liable, his person and property would be subject to an execution, and he must afterwards apply to government for a reimbursement, which would be no satisfaction to him for the inconvenience he had been put to.

The letter from the defendant's secretary shows that what he did was under the direction of government, and that the fund, out of which the plaintiff was to be paid, was the treasury. And though I consider the faith of government as pledged for the

acts of the defendant, yet I cannot consider him as personally answerable.

As to the objection that this should have been left to the jury, it is decisive that this question comes before the court on a motion to set aside the verdict, and not a nonsuit. There was no other evidence but letters, which were before the jury, and the judge had a right to give his opinion upon them. The construction of deeds is a matter of law, but that of letters is proper for the consideration of the jury.

BULLER, J. I do not agree with my brother WILLES as to the construction of letters. If they be written in so dubious a manner as to be capable of different constructions, and can be explained by other transactions, the whole evidence must be left to the jury to decide upon; for they are to judge of the truth or falsehood of such collateral facts which may vary the sense of the letters themselves; but if they be not explained by any other circumstances, then, like deeds or other written agreements, the construction of them is a mere matter of law.[1]

In what character then, as appears from these documents, did the defendant act throughout this business? It is true that he gave the orders to Sinclair, and that everything which the plaintiff did was pursuant to directions from the latter, whom he was instructed to obey; but these orders did not flow from the defend-

[1] Terry, Anglo-American Law, § 71, QUESTIONS OF CONSTRUCTION: "Questions of construction are as to the meaning conveyed by certain expressions. They occur most often with regard to written documents. Such a question may be one of pure law. The rule expressed in the maxim *ut res valeat quam pereat* or that of taking words *contra proferentem*, as also the purely arbitrary rules fixing the meaning of certain particular words and phrases above mentioned (see section 62), are ordinary rules of law, and when any one of them can be applied the construction becomes matter of law. But there are many cases where no rule at all can be used, where all that the court can do, and what it in fact does, is to look at the words and say, 'In our opinion the person who used these words meant to convey such and such a meaning.' This is nothing but a decision about a fact. Any person of equal intelligence but knowing nothing of law could decide it as well as the judge. It is a decision as to the existence of a state of fact as specific and incapable of being reduced to rule as the fact that when A discharged his gun he intended to hit B. It is true that there exists a general rule, which is really one of law, that the intention of the parties is to govern. But this gives no aid in finding out what that intention is. It simply tells what the judge is to do after he has ascertained the party's intention."

ant in his own personal character, but as governor and agent for the public; and so the plaintiff himself considered it. And in any case where a man acts as agent for the public, and treats in that capacity, there is no pretense to say that he is personally liable.

Rule discharged.[2]

DONAHUE v. WINDSOR, ETC., INS. CO.

56 Vermont, 374. [*1883.*]

TAFT, J. * * * The request that a verdict be directed, because "no notice in writing was forthwith after the fire given to the defendant's office," as required by the section quoted, the plaintiffs insist, was properly refused, as it does not embody a sound legal proposition, for the reason that the plaintiffs were entitled to a reasonable time to give such notice, and what was such time was a question of fact for the jury, and therefore the defendant had no right to have the matter ruled upon as a question of law. It was conceded that the property burned on the 24th day of September, 1879, and that the only notice of the loss given the defendants was dated the 16th day of October afterwards, more than twenty-two days after the fire. The question was presented whether that was a compliance with the requirement as to notice, that it should be given forthwith. It is unnecessary to set forth the reasons of such a condition; they are patent to all; a delay of several days or weeks in giving notice may obliterate all those traces of evil design in the insured which accompany fraudulent fires and render an investigation of their causes, or the damages resulting from them, exceedingly difficult; the importance of prompt notice is too clear to require argument or illustration to prove it. The condition that the insured should give the company notice forthwith should be construed liberally in favor of the insured. He should give the notice with due diligence and within a reasonable time, without unnecessary delay, under all the circumstances of the case. St. Louis Ins. Co. v. Kyle, and Inman v. Ins. Co., *supra;* Peoria M. &

[2] See also Key v. Cotesworth, 7 Exch. 595.

F. Ins. Co. v. Lewis, 18 Ill. 553; Niagara Fire Ins. Co. v. Scammon, Ill., S. C., 11 Ins. Law Jour. 614; Phillips v. Protection Ins. Co., 14 Mo. 220; Edwards v. Baltimore Ins. Co., 3 Gill, 176.

The question of whether a party has used due diligence or not in giving notice has sometimes been held to be a question of law; particularly in those cases where all the facts and circumstances are admitted or established, as where they are conceded or shown by the pleadings. Columbian Ins. Co. v. Lawrence, *supra*. But upon a jury trial where such facts and circumstances are open for the ascertainment of a jury, we think it should be left to them to determine as a question of fact. The courts in this State have always adopted this rule in all questions of doubt depending upon a general inference from a multiplicity of particular facts, and where the law has fixed no rule; such are questions of due diligence, reasonable time, probable cause, etc.[1]

[1] Terry, Anglo-American Law, § 70: "There is another much less simple class of cases where confusion arises between law and fact. The questions here are really questions of fact, but they are always decided by the court, not by the jury, and are usually called questions of law. We may therefore for convenience sake designate them as questions of 'curial fact.' They include some questions of construction, some of reasonableness, some of the admissibility of evidence, and a few others."

§ 72: "Questions of reasonableness come up in various connections. Most questions of negligence and not a few of malice, probable cause, fraud and also some others will be found on analysis to turn on one of reasonableness, and this is often one of curial fact.

"A question of law in the true sense is one that can be decided by the application to the specific facts proved to exist—here the conduct of some person and the circumstances in which he acted or omitted to act—of a pre-existing rule. Such a rule must contain a description of the kind of circumstances to which it is to apply and of the kind of conduct required. Some definable combinations of facts occur so often that they can be foreseen and provided for, for example, the sets of facts that constitute the making a contract, the taking possession of things, the receiving a fund to be paid over to another. In these the important facts are few. But in many cases the group of facts that would need to be provided for is so large and complicated or of such infrequent occurrence that it is not possible or not worth while to attempt to foresee them or to prescribe any determinate line of conduct. Thus a carrier by railroad in order to provide properly for his passenger's safety has to look after a hundred different items never twice the same. It would be out of the question to try to fix by statute the exact amount and kind of repairs that should be put upon each bridge or the exact manner in which every engineer should manage his loco-

Sessions v. Newport, 23 Vt. 9. It may be a question of law where the inference is one which admits of no doubt so that it will strike all minds alike. See also Starkie on Ev., 451, note (p). The Supreme Court of Connecticut in Lockwood v. Ins. Co., 46 Conn. 553, says: "Extreme cases either way may be easily determined. Between them there is a wide belt of debatable ground, and cases falling within it are governed so much by the peculiar circumstances of each case that it is much better to determine the matter as a question of fact." Such being the rule, the defendant had no right to have the question passed upon as one of law, and his request was properly refused. But the refusal did not terminate the duty of the court in the matter. Whether the insured had given notice forthwith was a point material to the decision of the case; without proof of that fact the plaintiff could not recover. There was evidence upon that point, and it was the duty of the court to charge correctly and fully whether requested to do so or not. Vaughan v. Porter, 16 Vt. 266. A party is entitled to such a charge as the facts in the case require. Hazard v. Smith, 21 Vt. 123. The County

motive. But where the law has laid down no rule there can be no question of law. Now in most of such complicated cases the law sets up simply the general rule of reasonable conduct. This is analogous to the general rule of construction that the intent of the parties shall prevail: it tells what ought to be done when the proposed conduct has been determined to be reasonable or not, but it does not help the determination whether it is reasonable. The rule usually propounded to act as a reasonable and prudent man would in the circumstances, still leaves open the question how such a man would act. No general rule can be imagined which should inform a man how fast, he being such a horseman and riding such a horse as he is, it is reasonable for him to ride through a street of such width and crowded to such an extent with people disposed in such a manner as that in which he finds himself. The question, was the specific conduct of the specific person in the specific circumstances reasonable or not, must usually remain as a question which is really one of fact.

"When the reasonableness or unreasonableness of the conduct is very plain, the court will decide it; when it seems to the court to fairly admit of doubt, it will be handed over to the jury. This is expressed in such sayings as that the court must decide whether there is any evidence of negligence, malice, fraud, want of probable cause, etc., or that the court must decide whether the facts may amount to negligence, etc., and the jury whether they do. In any case the court cannot avoid exercising a tolerably wide discretion whether to decide the question itself or not."

Court is always bound to charge the jury according to the rules of law whether specifically requested so to do or not. REDFIELD, J., in Buck v. Squires, 23 Vt. 498; and see 16 Vt. 579; 28 Vt. 222; 39 Vt. 565; 40 Vt. 495.

The question whether the notice required was given forthwith should have been submitted to the jury; but the point was ignored by the court, and no reference was made to it in the charge.

Judgment reversed and cause remanded for a new trial.[2]

PARKER v. IBBETSON.

4 Common Bench (N. S.), 346. [*1858.*]

This was an action against the defendant for wrongfully discharging the plaintiff from his service. * * *

The cause was tried before CRESSWELL, J., at the sittings in London after last Michaelmas term. It appeared that the defendant, who was a woolen merchant at Leeds, having a place of business in London, engaged the plaintiff to serve him in the capacity of agent or representative there, upon the terms contained in the following memorandum:

"Memorandum of agreement made between Henry Ibbetson & Co., of Leeds, of the first part, and Richard Awood Parker, of, etc., of the second part. The aforesaid Richard Awood Parker engages to serve the said Henry Ibbetson & Co. as agent or representative, at the salary of £150 per annum in consideration thereof. Also provided at the end of the year the said H. Ibbetson & Co. find the said Richard Awood Parker has done sufficient business to justify them in recompensing by making up his salary to £180 to do so, being a donation of £30 to his present stipulated amount of £150. As witness our hands this 30th day of January, 1857.

(Signed) "HENRY IBBETSON & Co.
"RICHARD AWOOD PARKER."

The plaintiff continued in the service of the defendant under this agreement until the 1st of August (receiving his salary

[2] See also Harden v. Ins. Co., 164 Mass. 304; compare McFarland v. Accident Co., 124 Mo. 204.

monthly), when the defendant gave him a month's notice to quit. For this dismissal, which the plaintiff contended was wrongful, and in contravention of the agreement, the present action was brought.

On the part of the defendant, several witnesses were called to prove a custom in the particular trade to dismiss at a month's notice, though the engagement was at a yearly salary. * * * In his summing up, the learned judge instructed the jury in substance as follows: * * * The parties first agree for a general hiring, at a yearly salary; then they add a proviso, that, if the employer shall at the end of the year consider the agent deserving of it, he shall be rewarded with a donation of £30. Now, the only legitimate effect of that—assuming the custom to have been established—would seem to be, that, by introducing that stipulation into the contract, they meant the custom to be excluded. The first question, then, for your consideration will be, whether such a custom as alleged exists in the particular trade; and the second question will be, whether the contract was made with reference to the custom, or was a special contract to which the custom did not apply. If you think the evidence establishes the custom, it merely remains for you to consider whether you infer from the latter part of the agreement that the parties meant to exclude the application of the custom in the particular case. If you think they did not contract with that intention, the defendant will be entitled to your verdict. If, on the other hand, you think the custom is not established, then the dismissal of the plaintiff before the expiration of the year is not justified, and he will be entitled to your verdict, with such damages as you may think him fairly entitled to for such wrongful determination of the contract.

The jury found, first, that the custom was proved; secondly, that the hiring was a special hiring, to which the custom did not apply; and thereupon they found for the plaintiff, damages £70.

HUGH HILL, Q. C., in Hilary term last, obtained a rule *nisi* to enter a verdict for the defendant, on the ground that the jury having found the fact of the existence of the custom for the defendant, their finding as to the special terms of the contract was immaterial; or for a new trial, on the ground of misdirection, inasmuch as it was not a question for the jury whether the special terms of the contract excluded the custom, but the con-

struction of the contract was for the court, and, according to the true construction, the custom was not excluded.

CROWDER, J. I am of opinion that this rule must be made absolute. The question arises in an action brought upon an agreement entered into between a clerk or servant and his employer in a certain trade, which agreement is in writing; and the contention at the trial was as to the existence of the custom stated in the fifth plea, and its application to the contract before the court. The jury were asked certain questions, and invited to draw certain conclusions. These were, whether the custom was proved, and whether, if proved, it was applicable to the special terms of this contract. On the part of the defendant it is contended that this latter was not a question for the jury, but for the court; and I am of that opinion. Looking at the evidence, it seems to have been established that there was a general custom in the trade that a yearly hiring might be put an end to by either party upon a month's notice. It is insisted on the part of the plaintiff that, assuming such a custom to exist, the special terms of this agreement exclude the application of it to this case. It seems to me that there is no foundation for that argument. The first part of the contract amounts simply to an engagement on the part of the plaintiff to serve the defendant as agent at the salary of £150 per annum; then follows a proviso that if "at the end of the year the said Henry Ibbetson & Co. (the defendant) find the said R. A. Parker (the plaintiff) has done sufficient business to justify them in recompensing by making up his salary to £180 to do so, being a donation of £30 to his present stipulated amount of £150." Reading this agreement—and its construction is for the court, and not for the jury—it seems to me to be simply an agreement for a yearly hiring at a yearly salary; and that there is nothing in the proviso to alter the nature and character of the agreement; it is a mere statement that the defendant will at the end of the year, if he shall see fit, make the plaintiff a present of £30. It is clear that this £30 could not have been recovered by action, if the service had lasted until the end of the year. The simple question is, whether, looking at the custom proved, which is general, there is anything in the written agreement to exclude it. I see nothing in it that can have that effect. The proviso cannot exclude it; that has no reference to dismissal. Then, if there is nothing in the contract that is inconsistent with the application of the general custom,

it is the same as if the custom had formed part of the written agreement. This case must follow the ordinary rule, that, wherever a contract is made in a particular trade, all customs which regulate that trade are tacitly incorporated into the contract, unless by express terms excluded. There was nothing to warrant the conclusion of the jury, and consequently the rule will be made absolute, not, however, to enter a verdict for the defendant, no leave having been reserved, but for a new trial.

WILLES, J. I am entirely of the same opinion. * * * The custom, being proved, becomes part and parcel of the contract. The jury had no right to take upon themselves to say that the special contract excluded the custom.[1] The evidence upon which that conclusion was founded does not in fact negative the application of the custom to a hiring under a contract like this. The witness merely stated that he did not know of an instance where under such an agreement as the present the custom had been acted upon.

BYLES, J. In cases of this nature, two questions generally arise—the one, a question of law, whether the terms of the agreement may admit or must necessarily exclude the custom; the other, one of fact, whether, if the agreement may admit the custom, the custom extends to the particular agreement. I do not therefore see that the learned judge was wrong in leaving this latter question to the jury. The evidence of the custom was irresistibly strong, and, although the jury might, upon proper evidence, have found a limited custom, there was no evidence of any such limitation here.

Rule absolute for a new trial.

[1] WILLES, J., in Berwick v. Horsfall, 4 C. B. (N. S.) 450: "It turned out that the document which conferred that authority upon him was lost. But the fact of a document being lost, does not make the construction of its contents a question for the jury. The true rule is laid down in Neilson v. Harford, 8 M. & W. 806. The construction of all written documents is for the court, and not for the jury. It was for the judge, therefore, to say whether or not there was such authority. He thought there was. The jury thought there was not. That, however, was quite immaterial, the question being solely for the court."

CUNNINGHAM v. WASHBURN.

119 Massachusetts, 224. [*1875.*]

Contract against W. A. Washburn and Frederick E. Abbott, upon an instrument under seal, dated October 15, 1871, and signed by the plaintiff and the defendants, reciting that the defendants were the owners of certain land in the city of Worcester, with a cottage standing thereon, which the defendants desired to remove to another part of the land, and providing as follows:

"Now, therefore, said Cunningham, being a practical carpenter and building mover, in consideration of four hundred and fifty dollars being paid to him, promises and agrees to move said building back upon the rear part of the lot, turn it half around, and front it on Barclay Street, dig and stone a cellar to set it on, and to finish said house ready for occupancy, doing the work well even to all the rooms, painting the house one coat of good oil and lead paint on the outside, and two good coats of oil and lead on the inside, and putting blinds on the windows outside, furnishing and finding all the stock and materials."

The declaration also contained a count upon an account annexed for stone and sheathing boards furnished, these not being included in the contract.

Trial in the Superior Court, before DEWEY, J., who allowed a bill of exceptions in substance as follows:

The defendant Washburn testified that he went to the house at the time one Pike, the plaintiff's agent, was building the cellar wall and using the new stones; that he asked Pike why he was using new stones instead of the old, and Pike said that Abbott had ordered them to be put in, and he, Washburn, then said that if Abbott had ordered them he might pay for them.

The plaintiff testified that he asked Washburn to pay for the job six weeks after it was finished, and he told him he was not going to pay for those new stones anything extra; that as Abbott had ordered them he might pay for them.

The defendant asked the judge to rule that the plaintiff could not maintain his action on the written contract, it being admitted by the plaintiff that he had not completed the contract if it required him to build a water-closet. The plaintiff admitted that he refused to put a water-closet into the house, and left the

house without putting one in; the defendants requested the judge to rule that the contract as a matter of law required that a water-closet or privy should be built. The defendants also asked the judge to rule that the claim for extra stone could not be maintained against the defendants jointly.

The judge declined to give either of the rulings requested, but instructed the jury as follows: "In relation to the defendants' claim that the plaintiff wilfully abandoned his contract before it was completed, and that the defendants were therefore not liable, such is the rule of law, where wilfully, without cause, a party neglects to complete and abandons his contract. If the plaintiff had wilfully abandoned the work, leaving the house not finished according to the contract, he could not recover. But if a party in good faith proceeds under a special contract, and doing what he reasonably supposes is required, and substantially completes it, and the other party accepts the benefit of the work, although the contractor may not have done all that was really his duty, or in the exact manner required, still he may maintain an action for his labor and materials, but he cannot necessarily recover the cost of his materials or the ordinary price of labor. The party for whom the work was done is entitled to have deducted from the contract price the difference between the value of the work as done, and its value if it had been done in accordance with the contract.

"In relation to the proper construction and interpretation of the contract, it is a question of law for the court to decide. The contract provides that the plaintiff should 'finish the house ready for occupancy,' and then proceeds to state the details as to a portion of the work; as far as the manner of doing the work and the kind of work is specified, it is to be done as thus specified; the only difficulty arises as to the work not specified, but which is required by the provision 'to finish said house ready for occupancy;' the court cannot, as a matter of law, give you the details the parties have omitted, but instructs you that the plaintiff would, under this provision of the contract, be bound to do all things that would be reasonably necessary and proper to make the house ready for occupation, taking into consideration, in determining what should be done, the character of the house he was to finish; and if the jury find that he omitted anything specified in the contract, or omitted any other thing that was reasonably required to have such house as is referred to and

described in the contract ready for occupancy, then he has not performed his contract and cannot recover upon it."

The judge also instructed the jury, that "in order to entitle the plaintiff to recover for the stone furnished, you must be satisfied that Abbott had authority from Washburn to make a change from the agreement as to the stone, and that if Abbott was acting for both in relation to the building and carrying out the contract, with a general authority from Washburn to make such changes as he deemed best, and he made the change as to the stone, Washburn would be bound thereby, or if Washburn, having knowledge of Abbott's acts, subsequently ratified the same."

The jury found for the plaintiff; and the defendants alleged exceptions.

DEVENS, J. The legal interpretation of a contract is for the court, which is to determine, where the words are unequivocal in their meaning, what it imports, and what are the obligations imposed by it. As, however, words and phrases are often used, which are technical or ambiguous, and sometimes, also, those which, although not in themselves unintelligible, require knowledge of the subject, in connection with which they are used, to apply them intelligibly, it may become necessary to resort to extrinsic evidence to ascertain thereby the intent of the parties in using them, in order that the contract may be construed in the light of the information thus acquired. The facts thus to be inquired into are determined by the jury under the direction of the court, which instructs them as to the construction to be given to the contract according to the various aspects in which such facts may present themselves. Eaton v. Smith, 20 Pick. 150; Burnham v. Allen, 1 Gray, 496; Smith v. Faulkner, 12 Gray, 251.

Whether the phrase "to finish said house ready for occupancy" was one which would require the building of a water-closet, depended upon certain extrinsic facts. The defendants do not object to the instructions given, in themselves, but contend that the court should have received the evidence of carpenters, and then, upon such evidence, have decided the matter without submitting it to the jury. This, however, would have taken from the jury its right to find the facts, and have trespassed upon its province. It is for the court only to decide the law upon the facts as they have been, or as they may be, ascertained; and

while what the contract requires to be done is a question of law, the submission of the case to the jury to find the facts, with proper instructions as to the various aspects in which they may present themselves, gives to the court the construction of the contract as completely as if the jury found the facts specially and the court afterwards interpreted the contract in view of them as found.

In Worcester Medical Institution v. Harding, 11 Cush. 285, relied upon by the defendants, it was held by the court, as a matter of legal construction of the peculiar contract in that case, that a full completion of the wall, there contracted for, was not necessary, but only such completion thereof as would be necessary for the purpose of putting on the roof of the building; and as the facts in regard to this were admitted, there was nothing for the jury. In the present case, what the contract required to be done could not be determined as matter of law, except by determining as matter of fact what was reasonably necessary and proper to be done, considering the character of the building to be erected.

The ruling upon the remaining question was also correct. Although the written contract required the plaintiff to furnish all the stone for the cellars, yet it was competent for the parties subsequently to agree for stone of an extra quality. Under the instruction given, the jury must have been satisfied that Abbott had authority from Washburn to make this change, or that Washburn, with a knowledge of Abbott's acts, subsequently ratified them, and in either case both would be liable.

Exceptions overruled.[1]

CRAWFORD v. OMAN & STEWART.

34 South Carolina, 90. [*1890.*]

Mr. Justice McIVER. On the 22nd of December, 1884, the plaintiffs and defendants entered into a written agreement, styled a lease, a copy of which is set out in the "case," and

[1] Compare N. W. Ins. Co. v. Muskegon Bank, 122 U. S. 501, where the court had to deal with the problem of what constituted "habitual drunkenness" within the meaning of a life insurance policy.

should be embraced in the report of this case. By the terms of this agreement the defendants, amongst other things, were to have the exclusive right of quarrying granite on the lands of the plaintiff for the term of ten years, with the privilege to defendants of renewal for another term of five or ten years at their election, in consideration whereof the defendants agreed to pay annually to the plaintiffs "one cent and one-quarter of one cent for every cubic foot of granite shipped of dimension stones during the first five years of this lease, and one cent and one-half of one cent per cubic foot of dimension stones during the second five years, and all subsequent terms of this lease. For all other stones shipped not dimension stones they agree to pay fifty cents per carload."

The defendants having worked the quarry for some two or three years, abandoned it, whereupon this action was commenced on the 31st of January, 1889. In the complaint the plaintiff undertook to state two causes of action, the first for breach of the written contract in not paying the price agreed upon for the stones quarried, and the second for damages for ceasing to work the quarry; but as the second cause of action has been practically eliminated by the ruling of the Circuit Judge on the motion for a new trial, to which no exception has been taken by the plaintiffs, we are confined to a consideration of the first cause of action. In support of this cause of action the plaintiffs, after alleging the making of the written contract, substantially as above stated, except that feature which prescribes the price of stone shipped, other than dimension stone, alleges that defendants "have quarried two hundred thousand blocks of granite, known as 'Belgian blocks;' and that said defendants have already shipped one hundred and ten thousand of said Belgian blocks, and they are ready to ship and are preparing to ship the remaining ninety thousand of said blocks." They then proceed to allege that the 200,000 Belgian blocks "so quarried by the defendants are equivalent to thirty-six thousand cubic feet of granite; that said Belgian blocks are 'dimension stone;' and that there is due and payable to the plaintiffs by the defendants, under said agreement, upon the said thirty-six thousand cubic feet of stone the sum of four hundred and fifty dollars," for which sum judgment is demanded.

Testimony was adduced tending to show how much stone had been shipped by the defendants, how much was at the quarry cut

into Belgian blocks, but not shipped, and also as to what was the meaning of the term "dimension stone," which seems to be a term of art, as to which there was considerable conflict among the witnesses. The plaintiff, Robert Crawford, who, as agent for his wife, his co-plaintiff, seems to have had entire charge of the business, testified that he regarded Belgian blocks as dimension stone, but there is no testimony that the defendants so regarded them. The circuit judge charged the jury that the defendants were liable not only for the stone actually shipped by them, but also for such as had been quarried and left at the quarry, using these words: "Whatever was quarried and ready for shipment may be considered in this contract as articles shipped;" and as to the rate that should be charged for the Belgian blocks, while they were not "dimension stones," yet if the testimony satisfied the jury that the term "dimension stone" was not used in its ordinary technical sense, but was intended to embrace Belgian blocks, then they could so find and allow the plaintiff to recover for the Belgian blocks at the rate fixed by the contract for dimension stone.

The jury having found a verdict in favor of the plaintiffs for the whole amount claimed—four hundred and fifty dollars—defendants appeal upon the following grounds: "1st. For that his honor erred in charging the jury that if the 75,000 Belgian blocks were quarried, then whatever was quarried and ready for shipment may be considered in this contract as articles shipped, and that the plaintiffs could recover therefor against the defendants. 2nd. In that his honor erred in this: that having charged the jury that the parties being quarrymen, there was a presumption that they contracted with reference to the technical meaning of 'dimension stone,' and having charged further that Belgian blocks were not dimension stone in its technical sense, it was error to submit to the jury the question whether the plaintiff had rebutted this presumption, when he had offered no testimony whatever to rebut the same."

The action being based upon a written contract, it is quite clear that the rights and liabilities of the parties must be determined by the terms of such contract, and it seems to us equally clear that, under the provisions of this contract, the plaintiffs had no right to demand, and the defendants were under no obligation to pay for any stone until it was shipped or sent to market, for such is the express provision of the contract. It does not

provide that defendants shall pay for the stone when it is quarried, or even when it is prepared for market, but only when it is shipped. Such being the contract of the parties, expressed in no equivocal terms, we do not see by what authority a court can undertake to change those terms. * * *

It seems to us also that the second exception is well founded. Inasmuch as the contract prescribed one price for "dimension stone," and another and much lower price for all other stone, it was, of course, very material to determine what was meant by the term "dimension stone," and especially whether Belgian blocks were embraced in that term. Now, as the term "dimension stone" was a term of art, it was competent, under the well settled rule, to receive evidence of experts as to the technical meaning of that term. 1 Greenl. Evid. § 280; 3 Am. & Eng. Encycl. L. 867-8, and notes. Accordingly such evidence was received in this case, and, as it was conflicting, a question of fact was presented as to the meaning of the term "dimension stone," and especially whether it included Belgian blocks, which it was the province of the jury to determine, and it was for the court to instruct them as to the proper construction of the contract, accordingly as they found one or the other meaning of the term to be correct.

It seems to us that the true rule upon this subject is well stated by PARKE, B., in Neilson v. Harford, 8 Mees. & W. 806, in the following language, taken from one of the notes to the passage in the Encyclopedia above cited: "The construction of all written instruments belongs to the court alone, whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the court either absolutely, if there be no words to be construed [or pehaps it would be better to say interpreted] as words of art or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally when those words or circumstances are necessarily referred to them."

This rule was illustrated in the case of Hutcheson v. Bowker, 5 Mees. & W. 535, where an offer had been made by letter to sell a certain quantity of "good barley," and the letter in reply, after stating the offer, contained the following: "Of which offer we accept, expecting you to give us fine barley and good

weight;" and it was held that although the jury might find the mercantile meaning of "good" and "fine" as applied to barley, yet they could not go further and find that the parties did not understand each other. The question whether there was a sufficient acceptance was a question to be determined by the court upon a proper construction of the letters, PARKE, B., saying: "The law I take to be this—that it is the duty of the court to construe all written instruments. If there are peculiar expressions used in them, which have in particular places or trades a known meaning attached them, it is for the jury to say what is the meaning of such expressions, but for the court to decide what is the meaning of the contract."[1] So, as was said by SHAW, C. J., in Eaton v. Smith, 20 Pick. 150 (quoting again from the Encyclopedia): "When a new and unusual word is used in a contract, or when a word is used in a technical or peculiar sense, as applicable to any trade or branch of business, or to any particular class of people, it is proper to receive evidence of usage to explain and illustrate it, and that evidence is to be considered by the jury; and the province of the court will then be to instruct the jury what will be the legal effect of the contract or instrument as they shall find the meaning of the word modified and explained by the usage."

It seems to us, therefore, that the circuit judge erred when he instructed the jury that while a Belgian block was not a dimension stone, if that word is to be interpreted in its technical sense, yet the question for the jury to determine in this case was whether the term "dimension stone" was used in this contract in its ordinary technical sense, or in some other sense. The written contract showed what terms had been used by the parties, and in view of the fact that one of those terms—"dimension stone"—was a term of art, the only question for the jury was, what was the meaning of that term in the art to which it is applied, and not whether the parties used that term in a sense different from that which it ordinarily bore. This would be allowing a party by parol evidence to prove that the understand-

[1] In Neilson v. Harford, 8 M. & W. 806, Baron Parke gave the following reason: "Unless this were so, there would be no certainty in the law; for a misconstruction by a court is the proper subject, by means of a bill of exceptions, of redress in a Court of Error; but a misconstruction by a jury can not be set right at all effectually." See also Chambers v. Riggstaff, 69 Ala. 140; Curtis v. Martz, 14 Mich. 506.

ing between the parties was different from that which the terms they have used ordinarily and properly import, which is not permissible, as it would be in effect varying the terms of a written contract by parol. See DeCamps v. Carpin, 19 S. C. 121. We must look alone to the written contract for the words used by the parties, and where some of the words are terms of art, it is for the jury to say, from the testimony adduced, what is the proper and technical signification of such terms, and there the province of the jury terminates, and it is for the court to determine the true construction of the contract, reading the terms of art used therein in the sense as thus ascertained by the jury. But the jury are not at liberty to say that though the words used by the parties properly mean one thing, yet the evidence shows that the parties intended them to mean something else; for that would permit the jury to substitute for the words actually used by the parties other words which they have not used. In this case both of the parties who were active in making this contract were quarrymen, with considerable experience in the business, and when they used a term of art, it must be presumed that they used it in its technical sense, and as it would ordinarily be understood by quarrymen, and in the absence of anything in the contract itself indicating that they intended to use that term in any other or broader sense, this presumption is conclusive.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and the case be remanded to that court for a new trial.

McKENZIE v. SYKES.

47 Michigan, 294. [*1882.*]

COOLEY, J. This is an action of replevin for a quantity of wheat which was raised by Sykes on the land of McKenzie, who is his father-in-law, while the parties were living together upon it. The chief controversy concerns the bargain under which the wheat was raised.

Both of the parties, and also their wives, were sworn and examined as witnesses. The testimony of Sykes tended to show that after his marriage with McKenzie's daughter in September,

1878, it was talked over between himself and McKenzie that he should live in the house with McKenzie, work the farm and raise what he could off it, let McKenzie have his living and his stock kept, and Sykes have the remainder; that under this arrangement he went on and sowed winter wheat, raised and harvested 701 bushels, drew off a part of it, when he was forbidden by McKenzie to take the remainder and therefore replevied it. He admitted that McKenzie assisted him somewhat in the work. Mrs. Syke's testimony supported to some extent that of her husband. On the other hand McKenzie testified that he told Sykes he might go on and work the farm and should have what was right, and when the wheat was harvested and threshed, he was willing to let him have one-half. This he seems to have thought was liberal, as he did a large share of the work and bore a part of the expense himself. Mrs. McKenzie seems to have heard no bargain but much vague talk.

On this evidence the question for the jury was whether Sykes owned the wheat, or on the other hand was tenant in common with McKenzie. The circuit judge instructed the jury that if Sykes was to cultivate the farm and have what he raised, allowing McKenzie his living and the keeping of his stock, then the title to the wheat was in Sykes. He also gave the following instructions: "If the jury find that McKenzie said to Sykes, 'You carry on this farm and manage it, and I will do what is right by you,' this means that 'upon settlement at the close of our arrangement'—or of the year, perhaps—'I will do in the matter of charges against you what is right.' So I say if the jury find the testimony upon that point as I have stated, it would not make them tenants in common."

It seems, therefore, to have been the opinion of the circuit judge that whether the one party was believed or the other, the title to the wheat was in Sykes. But the difficulty with this instruction is that he assumed to interpret for the jury the oral negotiations of the parties, and put a construction upon certain oral terms provided the jury should find they were in substance made use of. In doing this he took upon himself functions which belong to the jury exclusively. It is for the court to interpret the written contracts of parties, for when they have assented to definite terms and stipulations and incorporated them in formal documents, the meaning of these, it is supposed, can always be discovered on inspection; nothing which is within

the purview of the contract is left in doubt and there is, of course, nothing to submit to the jury. Thompson v. Richards, 14 Mich. 172. But where the terms of a negotiation are left to oral proofs, the question what the quarties said and did, and what they intended should be understood thereby, is single and cannot be separated so as to refer one part to the jury and another part to the judge, but in its entirety the question is one of fact. Strong v. Saunders, 15 Mich. 339; Maas v. White, 37 Mich. 126; Estate of Young, 39 Mich. 429; Engle v. Campbell, 42 Mich. 565. If, therefore, McKenzie in substance told Sykes to go and cultivate the farm and he would do by him what was right, it is not within the province of the judge to say that by this McKenzie meant he would do what was right in the matter of charges; but it was for the jury to consider all the conversation of the parties which made up the negotiation between them, and from the whole, in the light of the surrounding circumstances, determine according to their best judgment what was the meaning. In the light of all the facts the jury might perhaps conclude that the bargain, as the parties understood it, was, that McKenzie would pay for his son-in-law's services what was right, or that he would divide the crop with him as was right; but however that may be, it is sufficient for the purposes of this case that the result of the negotiations must be determined by the jury, not by the court.

The judgment must be reversed with costs and a new trial ordered.

BELT v. GOODE.

31 Missouri, 128. [*1860.*]

Appeal from St. Louis Circuit Court.

It is deemed unnecessary to set forth the facts in evidence more fully than they appear in the opinion of the court. The court, of its own motion, gave the following instruction: "If the jury find that the defendant employed plaintiffs in the capacity of real estate agents to sell land for him, and that they effected a sale thereof agreeably to such employment, and that there was no special agreement as to the compensation they in that behalf rendered, then the plaintiffs are entitled to recover

a reasonable compensation for such services. But if the jury find that there was a special continuous contract made between plaintiffs and defendant concerning such sale, and that one of the conditions of such contract was that plaintiffs should sell the land for a sufficient price to reimburse the defendant for the costs and expenses he had incurred concerning the land and to pay them for their services, then, in order for the plaintiffs to recover in this suit, the jury should believe from the evidence that the land sold for a sufficient sum to reimburse defendant for his said costs and expenses and to compensate plaintiffs; and if the sale was made under a contract with such a condition, the jury should find for the defendant, unless they believe that the land sold for a sufficient sum to reimburse defendants and to plaintiffs their compensation; and the burden of proving that plaintiffs have performed the conditions of such a special contract devolves upon the plaintiffs to entitle them to recover."

NAPTON, Judge, delivered the opinion of the court.

Judge Gaston observed, in the case of Young v. Jeffries, 4 Dev. & Batt. 220, that "where a contract is by parol, the terms of the agreement are of course a matter of fact, and if those terms be obscure or equivocal, or are susceptible of explanation from extrinsic evidence, it is for the jury to find also the meaning of the terms employed; that the effect of a parol agreement, when its terms are given and their meaning fixed, is as much a question of law as the construction of a written instrument." [1]

The question in this case was purely one of fact. The plaintiffs were employed by the defendant to sell a lot of ground, which he had purchased a short time before, upon a special agreement as to their compensation. The lot had been purchased by the plaintiff for one hundred thousand dollars, but previously to its purchase he had leased it from the owner at a rent of six thousand dollars per annum, and his losses on this lease, during the three years he held it, amounted to a considerable sum, estimated by a witness at thirty thousand dollars. The proceeds of the sale made by the plaintiffs were $122,705. The only question is as to the terms and meaning of the special contract, whether the compensation of the plaintiffs was made conditional on being reimbursed by the proceeds for the cost

[1] See also Brannock v. Elmore, 114 Mo. 55; Spragins v. White, 108 N. C. 449.

and expenses incurred both in the purchase and in the lease, or whether the indemnity was to extend only to the cost and expenses incurred in the purchase. If the former was the understanding of the parties, it is clear that the plaintiffs were not entitled to recover; but if the latter, they were. This was a question for the jury.

The objection to the instruction given by the court is, that its language is equivocal. There is an ambiguity in the terms of the instruction, which speak of "the costs and expenses incurred concerning the land." This may mean either the cost and expenses incurred in the purchase or in the lease, or in both. It is easy to put the question to the jury in such a way as to leave no doubt as to the subject for their inquiry; and as the jury may have been misled by the instruction alluded to, we shall remand the case for another trial.

Judgment reversed.

LOUDON SAVINGS SOCIETY v. HAGERSTOWN BANK.

36 Pennsylvania St. 498. [*1860.*]

WOODWARD, J. The Hagerstown Savings Bank brought this action of *assumpsit* against William McGrath and his numerous co-defendants, as partners trading and doing business under the name and style of the Loudon Savings Fund Society. The first count in the plaintiff's *narr.* is founded upon a "certain writing obligatory, commonly called a certificate of deposit, for the sum of five thousand dollars, signed by H. Easton, treasurer of said Loudon Savings Fund Society (who had full power conferred upon him to do such act), and then and there delivered said certificate of deposit to said plaintiff, and thereby promised to pay said plaintiff said sum of five thousand dollars, six months after the date thereof, with interest at 6 per cent." The second count is upon a certificate for a deposit of like sum, made by H. Easton, and by him endorsed, but delivered by the defendants to the plaintiff. Then follow the common money counts.

The copy of the certificate of deposit shows that it was issued on the 1st January, 1857, by H. Easton, treasurer, to himself for five thousand dollars, payable to his order six months after date, with interest at six per cent, and by him endorsed in blank.

Besides all the general pleas, the defendants pleaded specially: 1st. That the said writing obligatory was not their act or deed. 2d. That Hezekiah Easton had no power or authority, as treasurer of the Loudon Association or otherwise, to sign or endorse the certificate, and that he issued it fraudulently and corruptly, without the knowledge or authority of the defendants, of all which the plaintiff had knowledge when the certificate came into their possession. * * *

On the trial of the cause the learned judge directed the jury to return a verdict for the amount of the plaintiffs' claim, and declined to submit any question of fact for their decision. To the admission of evidence, and the refusal of the court to give instructions prayed for, sixteen errors are assigned, which I do not propose to consider in consecutive order, though all that is material in them shall be noticed.

It is apparent, that the great question raised upon the record had reference to the character and extent of Easton's authority, as the agent of the defendants. The party who avails himself of the act of an agent must, in order to charge the principal, prove the authority under which the act is done. If the authority be created by power of attorney, or other writing, the instrument itself must in general be produced; and since the construction of writings belongs to the court, and not to the jury, the fact and scope of the agency are, in such cases, questions of law, and are properly decided by the judge. But the authority may be by parol, or it may be implied from the conduct of the employer in sanctioning the credit given to a person acting in his name. And in many cases, the acts of an agent, though not in conformity to his authority, may yet be binding upon his employer, who is left, in such cases, to seek his remedy against his agent. Whether an employer be or be not bound by such acts as are not conformable to the commission given by him, depends principally upon the authority being general or special. By a general agent, is understood not merely a person substituted in the place of another, for transacting all manner of business, but a person whom a man puts in his place to transact all his business of a particular kind, as to buy and sell certain kinds of wares, to negotiate certain contracts, and the like. An authority of this kind empowers the agent to bind his employer by all acts within the scope of his employment, and that power cannot be limited by any private order or restriction, not known to

the party dealing with the agent. A special agent is one who is employed about one specific act, or certain specific acts only, and he does not bind his employer unless his authority be strictly pursued: Paley on Agency, 199, *et seq.* "A general authority," said Lord Ellenborough, in Whitehead v. Tuckett, 15 East, 408, "does not import an unqualified one, but that which is derived from a multitude of instances; whereas a particular authority is confined to an individual instance." And in all instances where the authority, whether general or special, is to be implied from the conduct of the principal, or where the medium of proof of agency is *per testes,* the jury are to judge of the credibility of witnesses, and of the implication to be made from their testimony.

As the plaintiff here did not produce any written evidence of Easton's agency, it was the duty of the court to inform the jury, what constitutes agency, express or implied, special or general, and to refer to them the question, 1st whether the evidence satisfied them that Easton was either the general or special agent of the defendants? and 2d whether the issuing of the certificate in suit was within the scope of his authority?[1] 3 W. & S. 79; 11 Harris, 247; 6 Casey, 513; 7 Id. 461.

Or if it was not a case of strict agency, if Easton acted without any authority in issuing the certificate, or transcended such as had been delegated to him, the question of ratification by the defendants was also a mixed question of law and fact. What would in law amount to ratification, was for the court; whether such proofs were found in the case, was for the jury. Such adoptive authority relates back to the time of the original transaction, and is deemed, in law, the same to all purposes, as if it had been given before: Lawrence v. Taylor, 5 Hill, 107-113; and see Livermore on Pr. and Agent, Vol. I, pp. 44-50; Railroad v. Cowell, 4 Casey, 337. * * *

ELLIOTT v. SOUTH DEVON RAILWAY CO.

2 Exchequer, 725. [*1848.*]

This was an issue directed by the Vice-Chancellor of England to try whether the South Devon Railway, in deviating from the

[1] See also Knight v. Luce, 116 Mass. 586.

level in passing over land of which the plaintiff was the owner and occupier, was passing through a "town," within the meaning of the 11th section of the Railway Clauses Consolidation Act, 8 and 9 Vict. Chap. 20, which enacts, that "in making the railway it shall not be lawful for the company to deviate from the levels of the railway, as referred to the common datum line described in the section approved of by Parliament, and as marked on the same, to any extent exceeding in any place five feet, or in passing through a town, village, street, or land, continuously built upon, two feet, without the previous consent, in writing, of the owners and occupiers of the land in which such deviation is intended to be made."

At the trial, before WIGHTMAN, J., at the Exeter Spring Assizes, 1848, it appeared that the plaintiff was the owner and occupier of certain fields, which, a few years ago, were unquestionably in the country. The town of Plymouth had, however, considerably increased, and the land adjoining the plaintiff's was now built upon, so that his land was on three sides bounded by houses and streets. On the fourth side it was bounded by building land, not yet built upon. The roads, for some distance beyond the plaintiff's land were lighted, paved, and watched by the commissioners acting in execution of the local act, 5 Geo. 4, Chap. 22. Although the plaintiff's land was, from its situation, very likely to be soon built upon, and was of great value as building land, it was as yet used as pasture land. By the Vice-Chancellor's order it was admitted that the railway, in passing over the plaintiff's land, had deviated from the level, as referred to the datum line, more than two and less than five feet, without the plaintiff's consent. The learned judge told the jury that the word "town," as used in the act, was to be understood in its ordinary and popular sense; and that it was for them to decide whether the plaintiff's land was in a "town," within the meaning of the act of Parliament; that the assessment and payment of rates under the local act was not a test. The jury found that the railway on the plaintiff's land was passing through a town, within the meaning of the act.

A rule having been obtained, calling on the plaintiff to show cause why there should not be a new trial, on the ground of misdirection on the part of the learned judge in not properly explaining to the jury the meaning of the word "town." * * *

PARKE, B.—There must be a new trial. The learned judge was

certainly not bound to define the meaning of the word "town," so as to embrace every possible case, yet he ought to have given a definition sufficient to enable the jury to decide the present question, which is, whether the railway can be considered as passing through a "town," within the meaning of the act of Parliament. It would appear that the word "town" is not to be understood in its strict legal interpretation, as a township having a church or a constable, but a place containing a number of houses congregated together—an inhabitated spot where the occupation is continuous. No railway entering the boundary of that town can be raised two feet without the consent of the persons through whose land it passes. Does, then, this railway enter the boundary of collected masses of houses? I think not. But it is a question for the jury whether this open space is continuously surrounded with houses. Such a space may be part of a town, although not built upon, if there are masses of houses around it; as, for instance, the green of Grosvenor square. Unless, therefore, this piece of land is surrounded with houses, so that the railway, in passing the boundary of it, enters masses of inhabited houses, the case is not within the act. I do not mean to say that the open space must be surrounded with houses touching each other, but only continuously surrounded with houses in the popular sense of the word "continuous." There ought to be a new trial, in order that the judge may define the meaning of the term "town" in this act of Parliament. * * *

Rule absolute.

FINNEY v. GUY.

189 U. S. 335. [*1903.*]

This action was commenced in a proper court of the State of Wisconsin to enforce the shareholders' liability under a Minnesota statute, in a corporation of Minnesota and doing business in that state. The defendant demurred to the complaint on the ground, among others, that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled by the trial court and judgment given for the plaintiff, which was reversed by the Supreme Court of the state, 106 Wisconsin, 256, and the case has been brought here by plaintiff to review the judgment of reversal.

The facts alleged in the complaint are in substance these:
* * *

The complaint then set forth several sections of the General Statutes of the State of Minnesota of 1878, among them being sections 5905, 5906, 5907 and 5911, and it was averred that this action could be maintained by reason of such sections. They are the same as are set forth in Hale v. Allinson, 188 U. S. 56. It was then averred that decisions in the courts of the State of Minnesota had been rendered relating to the liability of stockholders under those statutes, in corporations organized under the laws of that state, as to the proper method of enforcing such liability. The complaint then referred to some twenty different decisions in the state courts of Minnesota by titles and gave a reference to the volumes in which they were reported, and it then stated what the law of Minnesota was under those decisions and statutes, as to the liability of stockholders, and the manner in which that liability could be enforced and the effect of a judgment recovered in a state court by a creditor in his own behalf and in behalf of all others similarly situated, and it averred that a judgment such as was obtained in the Minnesota suit was conclusive upon stockholders, even though they were not parties thereto, as to all questions of indebtedness of the bank and who were its creditors, and that defendant, though not served with process in that suit, was concluded by the judgment as to her liability as shareholder, except as therein stated. It also averred that the Minnesota decisions held that after such a judgment had been obtained under those statutes a suit could be maintained in the courts of another jurisdiction, similar to the one before us, and the complaint ended with a prayer for judgment that the defendant should pay the plaintiff the sum of $3800, with interest thereon since April 28, 1897, and that A. C. Finney, one of the plaintiffs, be appointed receiver herein, to collect the amount and distribute the same pro rata among the other plaintiffs.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the court.

The demurrer raises the question whether the complaint states facts sufficient to constitute a cause of action. The plaintiffs contend that their cause of action is based upon the decisions and judgments of the courts of the State of Minnesota, and upon the statutes of that state, and that the Wisconsin Supreme Court

in sustaining the demurrer has thereby failed to give that full faith and credit to the laws and judgments of the State of Minnesota and its courts which they receive in that state and which they are entitled to under the Constitution and laws of the United States, and that by reason thereof a Federal right has been denied them.

They urged that, under the judgment of the American Savings & Loan Association v. Farmers' & Merchants' State Bank, which was recovered in the Minnesota court, and is referred to in the foregoing statement of facts, the defendant is concluded as to her defense to the same extent she would have been had she appeared and contested her liability in the Minnesota courts, and that as a consequence the Wisconsin courts are bound to give the same effect to that judgment in their courts that it has in the courts of Minnesota; that if such effect had been awarded that judgment, then this action could have been maintained; and the Wisconsin court in sustaining the demurrer denied such effect to the judgment, which was a violation of a right founded upon the Federal Constitution. * * *

After quite a full examination of the Minnesota decisions on the question, we have just decided in Hale v. Allinson, 188 U. S. 56, that a receiver appointed in Minnesota, under these same statutes, could not maintain an action outside of that state to enforce the liability of a stockholder, and it was said that the courts of Minnesota had held the same thing for many years. An examination of the decisions of the Minnesota courts shows that they had held that the remedy provided by the statutes of the state for the enforcement of stockholders' liability was a suit in equity in that state by a creditor in his own behalf and that of all other creditors, against all the stockholders of the corporation, or so many of them as could be served with process, and that it was exclusive, and no other remedy could be availed of even within the jurisdiction of the courts of Minnesota. That being the law of Minnesota, it would, of course, prevent an action outside the state, by a receiver as well as by any other plaintiff, to enforce the stockholders' liability. Hence, in the Hale-Allinson case, we held the receiver could not maintain such an action in a foreign jurisdiction and in a Federal court. * * *

The remedy being exclusive, the statute must be followed, and the result is that no other action to enforce the liability can be availed of in another state. This would call for an affirmance

of the judgment but for the claim now urged by counsel for plaintiffs, that the case of Allen v. Walsh has been overruled by subsequent cases in Minnesota, and that the law is correctly set forth in the complaint. He calls attention to the fact that this case has not gone to trial upon an issue of any question of fact, but the questions to be determined have arisen on demurrer to the complaint; that the complaint avers as a fact that by the law of Minnesota such an action as this can be maintained in the courts of a foreign jurisdiction after a judgment has been recovered in an action in the state court, such as is referred to in the complaint, and that the defendant by demurring admits that the law is as stated in the complaint, and therefore the court is bound to give effect to the law of Minnesota such as is set forth in that pleading. This is too broad a claim to be maintained.

If the case had been on trial upon issues of fact, among them being one as to what the law of Minnesota was, and the statutes as well as the decisions above mentioned had been proved and a witness learned in the law of Minnesota had testified what such law was, as deduced by him from those statutes and decisions, his testimony would not, even though uncontradicted, conclude the court upon that issue. Although the law of a foreign jurisdiction may be proved as a fact, yet the evidence of a witness stating what the law of the foreign jurisdiction is, founded upon the terms of a statute, and the decisions of the courts thereon as to its meaning and effect, is really a matter of opinion, although proved as a fact, and courts are not concluded thereby from themselves consulting and construing the statutes and decisions which have been themselves proved, or from deducing a result from their own examination of them that may differ from that of a witness upon the same matter. In other words, statutes and decisions having been proved or otherwise properly brought to the attention of the court, it may itself deduce from them an opinion as to what the law of the foreign jurisdiction is, without being conclusively bound by the testimony of a witness who gives his opinion as to the law, which he deduces from those very statutes and decisions.

It was stated by Mr. Justice BREWER, speaking for the court in Eastern Building & Loan Association v. Williamson, 189 U. S. 122, a case just decided and where the same question in substance was before us, as follows: * * *

"No witness can conclude a court by his opinion of the con-

struction and meaning of statutes and decisions already in evidence. Laing v. Rigney, 160 U. S. 531. The duty of the court to construe and decide remains the same."[1]

This right and duty of the courts to themselves construe the statutes and decisions are not altered because the law of the foreign state and the various decisions of its courts are alleged to be as set forth in a pleading which is demurred to instead of being proved on a trial.

In this case the statutes together with references to the decisions of the state courts are given in the complaint, and the pleader, by making an averment in the form of a fact, assumes to give a meaning to them such as he thinks to be correct, but the duty still remains with the courts to themselves determine from those statutes and decisions what is in truth the law of the foreign jurisdiction. The courts are not concluded by an averment of what is the law in a foreign jurisdiction, contained in a pleading which is demurred to, any more than they would be by the testimony of a witness to the same effect upon a trial; certainly not when the statute upon which the case rests is set forth and the decisions under it are also referred to as evidence of the law. The demurrer does not admit as a fact, that the construction (in the form of an averment of fact) which the pleader may choose to put upon those statutes or decisions is the right conclusion to be drawn from them. Notwithstanding the averments in the complaint we are brought to an examination of the

[1] FIELD, C. J., in Hancock National Bank v. Ellis, 172 Mass. 39: "The law of Kansas was a fact to be proved in the present suit. Where the evidence of foreign law consists entirely of statutes or reports of judicial decisions, the constructions and effects of the statutes and decisions are usually for the court alone. Bride v. Clark, 161 Mass. 130; Reyer v. Odd Fellows' Fraternal Accident Association, 157 Mass. 367; Gibson v. Manufacturers' Ins. Co., 144 Mass. 81. Where the decisions are conflicting, or where inferences of fact must be drawn, the question of what the law is becomes one of fact. Wylie v. Cotter, 170 Mass. 356."

GANTT, P. J., in Slaughter v. Ry., 116 Mo. 269: "The fact that it was necessary to prove a foreign law did not justify the admission of all the laws of that foreign state, whether relevant or not to the case on trial. When foreign laws are in evidence, it is not less the duty of the court to determine the law of the case from them, than it is its duty in declaring our own laws. Cobb v. Griffith & Adams Co., 87 Mo. 90; Charlotte v. Chouteau, 33 Mo. 194."

statutes and decisions referred to, in order to ourselves determine what the law of Minnesota is. * * *

We think the law of Minnesota still remains upon this particular matter as stated in the former cases, which have not been overruled by Hanson v. Davison. This, in effect, has been held in the Hale-Allinson case, which we have just decided. * * *

Whether, aside from the Federal considerations just discussed, the Wisconsin court should have permitted this action to be maintained, because of the principle of comity between the states, is a question exclusively for the courts of that state to decide. The right to maintain it under the facts of this case is not founded upon any provision of a Federal nature, and we cannot supervise the action of the Wisconsin court in this particular.

Affirmed.

REX v. FRANCKLIN.

17 Howell's State Trials, 625. [*1731.*]

Lord Chief Justice RAYMOND (charging the jury):

Gentlemen of the jury, this is an information, wherein the king is plaintiff, and Mr. Francklin defendant, for printing and publishing the Country Journal or Craftsman, the 2d of January, 1730, wherein is inserted an extract of a private letter from the Hague, reflecting on his majesty and his principal officers and ministers of state. In this information or libel, there are three things to be considered, whereof two by you the jury, and one by the court. The first thing under your consideration is, whether the defendant, Mr. Francklin, is guilty of the publication of this Craftsman or not? The second is, whether the expressions in that letter refer to his present majesty and his principal officers and ministers of state, and are applicable to them or not? This is the chief thing in the information; for if you think that these defamatory expressions are not applicable to them, then the defendant is not guilty of what is charged upon him; but if you think that they are applicable to them, then the defendant is guilty thereof; upon this supposition, that you find him to be the publisher of that paper. These are the two matters of fact that come under your consideration; and of which you are proper judges. But then there is a third thing, to wit,

whether these defamatory expressions amount to a libel or not? This does not belong to the office of the jury, but to the office of the court; because it is a matter of law, and not of fact; and of which the court are the only proper judges; and there is redress to be had at another place, if either of the parties are not satisfied; for we are not to invade one another's province, as is now of late a notion among some people who ought to know better; for matters of law and matters of fact are never to be confounded. As to the first thing, whether the defendant is guilty of the publication of that Craftsman which is under your consideration. And here in this and the second head I shall not be long, because things have been so often repeated, and all sorts of observations made on both sides that it is possible to be made on this occasion; and my endeavors shall be to hinder you from running away with notions which are not right. * * * So, gentlemen, you are to consider whether or not you are satisfied with the evidence produced to prove the defendant to be the publisher of that Craftsman of the 2d of January last. The next thing which you are to consider is, whether the expressions in that Hague letter, refer to his present majesty and his principal officers and ministers of state, and are applicable to them as in the information or not; for when people's names are not set down at length, but pointed at by circumlocution, or pieces of words, or by initial letters, etc., the law always allows innuendos in informations, which explain and tell what the defendant meant by them; and the law likewise allows juries to give their verdict on oath, whether they think that these dark, defamatory speeches have the same meaning as mentioned in the information or not. The counsel for the king have gone on and explained and applied these defamatory expressions exactly as in the information; and they have given their arguments and reasons for so doing; drawn from the several parts of that letter, which I shall not trouble you with, because they have been so often repeated in your hearing; I say, they have explained them as mentioned in the information; that is to say, that by these defamatory expressions, are meant his present majesty and his principal officers and ministers of state; and indeed they must be applicable, and refer to them or to somebody else; and if they do mean them, then I must say that they are very scandalous and reflecting expressions; because they charge them with perfidy in breaking of treaties, ruining in a manner their country, etc., as you may see at large

in the letter; and it is very evident that these treaties could not be made without the knowledge and direction of his majesty. The counsel for the defendant said, that these scandalous expressions could not be understood to refer to his majesty or his ministers; but they did not tell to whom they referred; I should have been glad to have heard them do so; so that you are to consider of whom these defamatory expressions are meant, or to whom they are applicable, and as to the rule and manner of understanding them, you are to do it, on oath, after the same manner and way as you do privately by yourselves, taking all the parts of the letter together. I shall not repeat the several parts of it now which the king's counsel did use, to show that they were meant of his majesty and his ministers, because you are to have the letter along with you; for it is plain, that the construction of it depends on the words themselves and their connection. Gentlemen, I have been very short in summing up the evidence; and laid aside the points of the law; I mean, whether these defamatory expressions amount to a libel or not; because the court can only determine that; and if not satisfactory to either of the parties, there is a proper redress to be had at another place, as I said before. There was one thing more mentioned by the defendant's counsel, which was, that there is no room to think that letter libelous; because there could be no malice supposed by inserting it in the Craftsman, being only designed as a piece of foreign news; and that the latter part of the letter qualifies it. by saying that the letter-writer does not take upon him to justify the truth of that report; but that will not do, for the injury is the same to the persons scandalized, whether the letter was inserted out of malice or not; besides, there is no knowing or proving particular malice, otherwise than from the act itself; and therefore if the act imports as much, it is sufficient; nor is he to take the liberty to print what he pleases; for the liberty of the press is only a legal liberty, such as the law allows; and not a licentious liberty. Gentlemen, I tell you again, that I have designedly shortened things, because it hath been so fully again and again laid before you. But if there is any thing afterwards that you want to know, after you have considered these things, I desire you would acquaint me. So, gentlemen, if you are sensible, and convinced that the defendant published that Craftsman of the 2d of January last; and that the defamatory expressions in the letter refer to the ministers of Great Britain, then you ought

to find the defendant guilty; but if you think otherwise, then you ought not to find him guilty.

The jury found the defendant guilty of publishing the said libel.

STATE v. PATTERSON.

68 Maine, 473. [*1878.*]

On exceptions from the Superior Court.

Indictment under R. S., Chap. 118, § 23, for maliciously threatening to accuse the complainant, Oliver H. Briggs, of some offense with intent to extort money from him, by sending him a written communication of the following tenor:

"Freeport, Sept. 31

you may if you pleas you can enclose ten dollers in an letter and cend it to Joseph Boothby Yarmouth me or els you will be enbited next tuesday or complained of me no fool

demacratt head quarters."

The presiding judge stated to the jury that the construction of the written communication was a question of law for the court, and instructed them that, so far as its terms were concerned, it did constitute a threatening communication within the meaning of the statute, and that, if all other facts necessary to establish the guilt of the respondent were proved, a verdict of guilty should be rendered.

The defendant alleged exceptions.

PETERS, J. The respondent was indicted for sending to the complainant a threatening letter with the intent to extort money. The first question that arose at the trial was whether it was the province of the court or of the jury to interpret the letter.

As a rule, both in civil and criminal cases, cases of libel to some extent excepted, writings are to be expounded by the court. Whenever a paper can be understood from its own words, its interpretation is a question of law for the court. Nichols v. Frothingham, 45 Maine, 220; Nash v. Drisco, 51 Maine, 417; Fenderson v. Owen, 54 Maine, 372; State v. Gould, 62 Maine, 509. Wills, deeds and other contracts usually fall under this classification. In such cases, the meaning of the instrument, the promise it makes, the duty or obligation it imposes, is a question of law for the court.

There is, however, a large class of writings where the meaning of particular words or phrases or characters or abbreviations must be shown by evidence outside the writing, and there may be extrinsic circumstances of one kind or another affecting its interpretation, which may be shown by oral testimony. Here the same rule virtually applies as before. It is often but inaccurately said, in cases of the kind named, that the writing itself is to be passed upon and construed by the jury. Strictly, that is not so. They find what the oral testimony shows, and the court declares what the writing means in the light of the facts found by the jury. The facts may be found by a special verdict, and then the court interpret the writing in view of such finding, or the case may go to the jury with hypothetical instructions from the court, or to render a verdict one way if certain facts are found, and another way if the facts are found differently. The court may first inform the jury as to the law, or the jury may first inform the court as to the facts, as may be most practicable. Hutchison v. Bowker, 5 Mees. & W. 535, 540; Smith v. Faulkner, 12 Gray, 251, 255; Putnam v. Bond, 100 Mass. 58; Cunningham v. Washburn, 119 Mass. 224; Powers v. Cary, 64 Maine, 9, 21.

Of course there are exceptions to the rule. It frequently happens that a writing is introduced merely as a fact or circumstance tending to prove some other fact. In such case it is generally but a link in a chain of evidence, the accompanying evidence being mostly or altogether oral. When that occurs the jury have to pass upon the whole transaction, of which the writing is but a part. The question then is, not so much what the document means, but what inference shall be drawn from its meaning, and what effect it shall have towards proving the point at issue. The writing and all the concomitant evidence go to the jury together. Here the duty of the court is comparatively unimportant. It may pronounce what meaning the writing is or is not capable of, and whether it is or not relevant to the issue; still the value and effect of such evidence is a question of fact for the jury. The opinion in Barreda v. Silsbee, 21 How. 146, 147, speaks of such a writing as evidence "collaterally introduced." Other cases denominate it "indirect evidence." The case of Miller v. Fichthorn, 31 Pa. St. 256, defines it thus: "A writing as evidence of a relation or right, must be direct or indirect evidence of it. Statutes, ordinances, wills, conveyances and

other contracts which, *per se,* declare the right or relation, are direct evidence of it. Letters, contracts *inter alios,* or *de aliis rebus,* or any other writings demonstrative of facts relevant to the matter in controversy and tending to show its true character, are indirect evidence of it. The indirect written evidence of a relation is usually accompanied by oral testimony aiding or rebutting the inference desired to be drawn from it, and all such usually go to the jury together, as evidence on the disputed question; and this was the meaning of Chief Justice Gibson (1 Pa. St. R. 386), when he said that 'an admixture of parol with written evidence draws the whole to the jury.'" The following cases are pertinent hereto: Primm v. Hazen, 27 Mo. 211; Heft v. McGill, 3 Pa. St. 257; Reynolds v. Richards, 14 Pa. St. 208; Iasigi v. Brown, 17 How. 183; Bolckow v. Seymour, 17 C. B. (N. S.), 107.

The rule may be subject to other qualification. It is sometimes difficult to determine, in the construction of papers, where the office of the court ends and that of the jury begins. But, in view of the rule or any possible qualification, we think the judge at *nisi prius* was right in undertaking, as matter of law, to give an interpretation of the letter relied on by the government as being a threatening communication. His course is sustained by direct authorities. Regina v. Smith, 2 Car. & Kir. 882; Rex v. Boucher, 4 Car. & P. 562; Rex v. Pickford, Id. 227.

The other question is whether the judge interpreted the letter correctly or not. He directed the jury to regard the letter as, *per se,* a threatening communication. He does not say what the crime or offense indicated in the letter was. He merely informs the jury that an accusation of some person for some crime or offense was intended. The letter, upon its face, can bear no other interpretation. What extrinsic and independent facts there were to modify the *prima facie* character of the communication, does not appear in the exceptions. All opportunities of explanation, it is presumed, were allowed to the state and also to the accused. Parol evidence was admissible for the purpose. Archbald Crim. Prac. and Plead. Title: Threatening Letters, p. 325; Goodrich v. Davis, 11 Met. 473; Shattuck v. Allen, 4 Gray, 540, 546; White v. Sayward, 33 Maine, 322. Threatening letters are likely to be written with as much disguise and artifice as possible, and be sufficient to accomplish the purpose intended, requiring evidence *aliunde* to explain them.

It was not necessary to submit to the jury to ascertain what the term "inbited" was intended for; it not appearing that any extraneous facts were offered for that purpose. If its intended meaning could be best determined by external facts and circumstances, then the question was one of fact for the jury. If ascertainable from an inspection of the whole paper itself, in such case it was a question of law for the court. It is obvious enough from the context that an indictment was the thing threatened. The letter "d" in the word was deficiently made. Fenderson v. Owen, *supra;* Coolbroth v. Purinton, 29 Maine, 469; Green v. Walker, 37 Maine, 25; Gallagher v. Black, 44 Maine, 99.

Exceptions overruled.

PARMITER v. COUPLAND.

6 Meeson & Welsby, 105. [*1840.*]

This was an action on the case for a series of libels published of the plaintiff, the late mayor of the borough of Winchester. in the Hampshire Advertiser newspaper, between the 17th of November, 1838, and the 2d of March, 1839, imputing to him partial and corrupt conduct, and ignorance of his duties, as mayor and justice of the peace for the borough. The defendants pleaded not guilty. At the trial before COLERIDGE, J., at the last Winchester Assizes, the learned judge, in the course of his summing up, stated to the jury that there was a difference with regard to censures on public and on private persons; that the character of persons acting in a public capacity was to a certain extent public property, and their conduct might be more freely commented on than that of other persons; and having told the jury what, in point of law, constituted a libel, he left it to them to say whether the publications in question were calculated to be injurious to the character of the plaintiff. The jury having found a verdict for the defendants.

Erle, in last Michaelmas term, obtained a rule *nisi* for a new trial, on the grounds (amongst others), 1st, that the learned judge ought to have directed the jury that, in point of law, the publications complained of were libels on the plaintiff; and, 2d, that it was a misdirection to state to them any distinction as regarded publications relating to public and to private individuals. In this term,

Crowder appeared to show cause, but the court, after the report of the learned judge had been read, called upon Erle and Butt to support the rule. The learned judge misdirected the jury, is not stating to them, as matter of law, that these publications amounted to libels. When words spoken are complained of as defamatory, the only questions for the jury are, (supposing them to be proved as laid), whether they apply to the plaintiff, and whether the meaning ascribed to them in the innuendoes is made out by the evidence: and a different principle cannot be applied to oral and to written slander. The words here complained of were clearly actionable if spoken; and the judge would in such case have been bound to tell the jury, that if they were meant in their ordinary sense, the plaintiff was entitled to recover. It has been often entertained as a question of law by a Court of Error, whether a particular writing amounts to a libel. In Wright v. Clement, 3 B. & Ald. 503, a declaration stating that the defendant published a libel, containing false and scandalous matters concerning the plaintiff, in substance as follows, was held bad in arrest of judgment, on the ground that the court must judge whether the words set out constituted a ground of action or not. (Alderson, B.—That is for the benefit of the defendant; the court are to see whether, in any reasonable sense, the words may be innocent.) If the court are so to judge for the defendant, whether it be a libel or not, so must they also for the plaintiff. (Alderson, B.—That does not follow.) Holroyd, J., there says: "It is clear, that when it can be shown distinctly what the instrument is upon which the whole charge depends, that instrument must be shown to the court, in order that they may form their judgment." (Alderson, B., referred to Chalmers v. Payne, 3 T. R. 428, n.) Where the libel is in a foreign language, if a translation of it only be set forth, the judgment will be arrested: Zenobia v. Axtel, 6 T. R. 162. If the defendant demurs to the declaration, then it clearly becomes a question of law. (Alderson, B.—Then he admits a malicious publication. Parke, B.—The practice used to be as you say before Mr. Fox's Act, 32 Geo. 3, Chap. 60.) That act is expressly confined to criminal cases. (Parke, B.—It is true; but it has been the constant practice, in recent times, for the judge to define what is a libel, and then to leave it to the jury, first, whether the writing complained of was published by the defendant; secondly, whether it fell within the definition of the

offense.) Lord Mansfield distinctly laid it down, in the case of Rex v. Dean of St. Asaph, 2 C. M. & R. 156, as a general rule applicable to all cases where, by the form of the pleadings, the questions of law and fact can be severed, that the jury have no jurisdiction to decide upon the law. Where, indeed, the words may be controlled by the context, or are capable of more than one meaning, the question must be left to the jury; but here there is nothing whatever to throw any ambiguity upon the meaning of these paragraphs. (Parke, B.—In criminal cases, the judge is to define the crime, and the jury are to find whether the party has committed that offense. Mr. Fox's Act made it the same in cases of libel, the practice having been otherwise before.) In the next place, it was a misdirection to state to the jury that there was a distinction as to libels on a person in a public capacity. No man has a right to impute to another, whether filling a public capacity or not, injustice or corruption.

Crowder, contra, was not called on to argue the above points.

Parke, B.—The verdict is unquestionably wrong, and there ought to be a new trial, but on the ground of its being a wrong verdict only. I think there was no misdirection on the part of the learned judge. One of the grounds upon which this rule was obtained, was, that the learned judge ought to have told the jury that the terms of these papers were libelous, and not to have left that as a question of fact for them to determine. But it has been the course for a long time for a judge, in cases of libel, as in other cases of a criminal nature, first to give a legal definition of the offense, and then to leave it to the jury to say, whether the facts necessary to constitute that offense are proved to their satisfaction; and that, whether the libel is the subject of a criminal prosecution, or civil action. A publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule, is a libel. Whether the particular publication, the subject of inquiry, is of that character, and would be likely to produce that effect, is a question upon which a jury is to exercise their judgment, and pronounce their opinion, as a question of fact. The judge, as a matter of advice to them in deciding that question, might have given his own opinion as to the nature of the publication, but was not bound to do so as a matter of law. Mr. Fox's Libel Bill was a declaratory act, and put prosecutions for libel on the same footing as other criminal cases.

I also think that there was no misdirection in the other part of the learned judge's summing up, to which an objection was raised. There is a difference between publications relating to public and private individuals. Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he do not make his commentary a cloak for malice and slander; but any imputation of wicked or corrupt motives is unquestionably libelous; and such appears to be the nature of the publications here. I do not find that the learned judge stated otherwise: we cannot therefore grant a new trial, as for a misdirection.

Alderson, B.—I entirely concur. The first question is, whether the learned judge ought to have laid it down positively, that if the publications were proved, and the words were used in their ordinary sense, the jury must find that they were libels. I think it would not be correct so to do; but that he ought—having defined what is a libel—to refer to the jury the consideration of the particular publication, whether falling within that definition or not. I think that if he were to take it upon himself to say that it was a libel, he would be wrong in doing so.[1]

[1] See same practice in Broome v. Gasden, 1 C. B. 728 (1845), where a verdict for defendant was approved. In Haire v. Wilson, 4 Man. & G. 605 (1829), the court approved a direction to find the publication a libel. Compare Sharp v. Larson, 67 Minn. 428. In slander, see Simmons v. Mitchell, L. R. 6 App. Cases, 156. For reference to the practice in the State Trials, see 4 Doug. loc. 101.

It is difficult, if not impossible, to determine the precise way in which such questions were dealt with under the older practice because the cases are not fully reported. Lord Mansfield called attention to this fact in the Dean of St. Asaph's case, 3 Term. Rep. 428n. In several of the State Trials for seditious libels nothing appears to have been left to the jury except the fact of publication. In some of the civil cases, e. g. Levi v. Milne, 4 Bingham, 195, the court held the publication defamatory and enforced its opinion on the jury. In a number of the older cases the meaning charged in the innuendo was submitted to the jury, though in what terms does not appear. See R. v. Shipley, 4 Douglas, 73; Oldham v. Peake, 2 Wm. Blackstone, 959; Roberts v. Camden, 9 East, 93. See Chief Justice Shaw's explanation of the older practice in Com. v. Anthes, 5 Gray, 185. In a very large number of cases, after verdict for plaintiff, the judgment was arrested because the court was of the opinion that the language did not, or could not, bear the meaning imputed by the innuendo, as in Hearne v. Stowell, 12 Adol. & Ellis, 719. As to this last point, see the various opinions in Capitol & Counties Bank v. Henty, L. R. 7 App. Cases, 741.

As to the other point, there certainly is a material distinction between a publication relating to a public and a private person whether they be libels. That criticism may reasonably be applied to a public man in a public capacity, which might not be applied to a private individual. The same thing might be no libel on me, which might be a very grievous and injurious libel on another. There may be, and I think in this case there was, no real difference between the two cases, but that this was a libel on the plaintiff in whatever capacity. But I think the learned judge right in the general observation, although I might differ with him in its application to the particular case. Probably, indeed, he applied it only to the question as to the amount of damages. It is, however, sufficient to say, that it does not appear to me to be a misdirection.

Gurney, B., concurred.

Rule absolute, on payment of costs.

TWOMBLY v. MONROE.

136 Massachusetts, 464. [*1883.*]

Tort in four counts. * * * The fourth count alleged that the defendant caused to be published in a newspaper in Haverhill a false and malicious libel concerning the plaintiff, a copy of which was as follows: "The Locust Street Brutality explained. The woman came to my house, Sept. 16, 1882, engaged a suite of rooms for $1.50 a week. She left April 11, 1883. She paid $34.50. About three months ago she decided not to come down stairs at all; consequently she was a great deal of trouble. I told her six weeks ago, that if she would leave the 1st of April, and give me $6, I would give her a receipt in full. She wouldn't do it. She kept her door locked, and would not give any satisfaction. I sought advice, and did as I was told. She is not a stranger here,—she never made friends. Can find out all about her by taking a little trouble. The Landlord."

Trial in the Superior Court, before STAPLES, J., who allowed a bill of exceptions, in substance as follows: * * *

The plaintiff then introduced evidence tending to prove that the defendant caused to be published in the Haverhill Daily

Bulletin, a newspaper published in Haverhill, the article alleged to be a libel in the fourth count; and that it was published of and concerning the plaintiff, and referred to her. No damage was offered to be shown except such as would be implied from the fact of such a publication.

The judge ruled, as matter of law, that the publication was not in itself libelous or actionable; and directed the jury to return a verdict for the defendant.

The jury returned a verdict for the defendant on all the counts; and the plaintiff alleged exceptions.

FIELD, J. * * * The fourth count is for a libel. The presiding justice ruled, as matter of law, that the publication was not libelous or actionable. This count contains no statement of extrinsic facts, and no *colloquium*, except that the publication was concerning the plaintiff, to show that the words published were used or capable of being understood in any other than their ordinary sense; and the question is, whether the words published, in their ordinary import, have any tendency to bring the plaintiff into public hatred, contempt, or ridicule. Pub. Sts. Chap. 167, § 94, Forms of Declarations in Slander and Libel; Commonwealth v. Child, 13 Pick. 198; Carter v. Andrews, 16 Pick. 1; Chenery v. Goodrich, 98 Mass. 224; York v. Johnson, 116 Mass. 482.

If the words published are fairly capable of two meanings, one harmless and the other defamatory, it is a question for the jury in what sense readers may have understood them. See Simmons v. Mitchell, 6 App. Cas. 156. If the declaration is demurred to, the court must determine whether it sets out a good cause of action. Goodrich v. Davis, 11 Met. 473; Chenery v. Goodrich, *ubi supra;* Homer v. Engelhardt, 117 Mass. 539. In Shattuck v. Allen, 4 Gray, 540, "after the cause was opened to the jury, it being objected that the publication was not libelous, and the court inclining to that opinion, it was withdrawn from the jury, and submitted to the whole court." The court said, that the point whether the question of libel or no libel should have been sent to the jury was not made at the trial, or reserved in the report, and, after commenting upon the law and practice in this respect, entered judgment for the defendant.

For the law in criminal prosecutions for a libel, see Commonwealth v. Anthes, 5 Gray, 185, 212, *et seq.*, and the cases cited in the dissenting opinion of Mr. Justice Thomas.

In England, by the St. of 32 Geo. III, Chap. 60 (1792), it was provided that, on the trial of an indictment or information for a libel, the jury may give a general verdict, and shall not be required or directed by the court to find the defendant guilty merely on proof of publication, and "of the sense ascribed to the same in such indictment or information;" that the presiding judge may give directions to the jury as in other criminal cases, and the jury may in their discretion find a special verdict; and the defendant, if found guilty, may move in arrest of judgment. This act, as is well known, was designed to protect defendants in criminal prosecutions for a libel from the power of the judges; but it has undoubtedly had some effect upon the proceedings in civil actions. In civil proceedings for a libel in England, it is said that "it is only when the judge is satisfied that the publication cannot be a libel, and that, if it is found by the jury to be such, their verdict will be set aside, that he is justified in withdrawing the question from their cognizance." Kelly, C. B., in Cox v. Lee, L. R. 4 Ex. 284, 288. Channell, B., in the same case, seems to have been of opinion that in every civil case, at the trial, the question of libel or no libel must be submitted to the jury; but this is not the English law. The existing law of England is not stated with entire accuracy by Kelly, C. B., as is shown by Mulligan v. Cole, L. R. 10 Q. B. 549; Hart v. Wall, 2 C. P. D. 146; Hunt v. Goodlake, 43 L. J. (N. S.) C. P. 54; and Capital & Counties Bank v. Henty, 5 C. P. D. 514; S. C. 7 App. Cas. 741.

We are satisfied with the rule, that, at the trial of civil actions for a libel, it is only when the court can say that the publication is not reasonably capable of any defamatory meaning, and cannot reasonably be understood in any defamatory sense, that the court can rule, as matter of law, that the publication is not libelous, and withdraw the case from the jury, or order a verdict for the defendant.[1]

We cannot say that the publication in the case at bar does not impute to the plaintiff an intention to keep possession with-

[1] Compare Negley v. Farrow, 60 Md. 158. When the question arises on demurrer, see McGinnis v. Knapp, 109 Mo. 131. Under the constitutional provision in Missouri making the jury the judges of both law and fact in suits and prosecutions for libel, the court can not direct a verdict for the plaintiff, Heller v. Pub. Co., 153 Mo. 205; the jury can not determine the law generally, but are limited to the question of

out paying rent; and that the words, "She is not a stranger here,—she never made friends. Can find out all about her by taking a little trouble,"—do not convey an implication or insinuation that the plaintiff is considered unfit for friendly intercourse by her neighbors, and do not thus tend to expose her to obloquy; if so, the publication may be libelous. We think the presiding justice erred in ruling, as matter of law, that the publication was not libelous, and in not submitting the question to the jury.

Exceptions sustained.

MORGAN v. HALBERSTADT.

60 Federal Rep. 592. [*C. C. A. 1894.*]

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action by Sigismundo E. Halberstadt against Henry A. Morgan, as president of the New York Times, for libel. There was a verdict for plaintiff for $15,000 damages, and judgment thereon, and defendant brings error.

LACOMBE, Circuit Judge. The complainant sets out four causes of action, based on separate articles, which appeared in the defendant's newspaper on September 5, September 30, October 10, and November 1, 1891, respectively.

The first of these is as follows:

"This is the situation in the Beers' Mutual Admiration Society at Broadway and Leonard street. Everything is done to avoid publicity and to screen the truth. Not one of the twenty men composing the board of trustees, save those two or three who hold executive offices, knew of the Merzbacher defalcation until the Times exposed it. Not one of these men—these alleged guardians of trust funds—knows that Halberstadt, Beers' Mexican agent, is short in his accounts $28,000; and yet this same Halberstadt, while standing in the barroom of the Hoffman House, early last March, surrounded by such men as Merzbacher and Dinkel-

whether the publication is libelous. Arnold v. Jewett, 125 Mo. 241; the court may direct a verdict for defendant in case of privilege, Finley v. Steele, 159 Mo. 299; or because the publication is not actionable, Ukman v. Daily Record, 189 Mo. 378.

spiel, boasted of the manner in which he was helping himself to the company's funds."

The second is as follows:

"The policy of the New York Life with reference to its defaulting agents in Spanish America furnishes another explanation of the distrust with which the company has long been regarded by the policy holders in Rio. The career of John Davis, for instance, is familiar to everybody in the tropics who takes an interest in insurance matters. Davis, it will be remembered, handled a business of $9,000,000 a year in Mexico. He led a fast life, and when he disappeared one day his accounts were found to be short $30,000. No attempt was made to arrest him. The career of the two agents who immediately preceded Davis is equally notorious in the tropics. These agents, or one of them at least, owed his appointment to the defaulter Merzbacher. Their shortage was found to be $60,000. Neither of them was arrested. The case of the intemperate German agent, who was found to be short in his accounts $12,000, in Chile, and who was subsequently transferred to Mexico, is another familiar story. This agent was not only not punished, but he was transferred to another agency. Then came the defaulter Merzbacher, with a shortage of $700,000 standing opposite his name. The news of his defalcation was received in Brazil with astonishment." * * *

1. Plaintiff in error assigns error in the instructions to the jury, in that the circuit judge charged as follows:

"The articles in the New York Times are charged in the complaint to be each and every one libelous. The explanation (or, as it is called in legal phrase, the innuendo) which is given in the complaint of the meaning of the articles represents that the articles were libelous. In my opinion, gentlemen, each article was in fact libelous."

To which charge defendant duly excepted.

The very authorities cited by the plaintiff in error abundantly sustain this part of the charge. They hold that the language used must be given its ordinary meaning; that the test is whether, in the mind of an intelligent man, the language naturally imports a criminal or disgraceful charge; that the language is to be understood by the court in the sense in which the world generally would understand it, giving to the words their ordinary meaning; that the language is to be understood in the ordinary and most natural sense; and that, when the writing complained

of is plain and unambiguous, the question in a civil action, whether it is a libel or not is a question of law. Hayes v. Ball, 72 N. Y. 420; More v. Bennett, 48 N. Y. 472; Williams v. Godkin, 5 Daly, 499; Weed v. Foster, 11 Barb. 203; Snyder v. Andrews, 6 Barb. 43—to which list of authorities may be added Rue v. Mitchell, 2 Dall. 58, holding that "the sense in which words are received by the world is the sense which courts of justice ought to ascribe to them" on the trial of actions such as this. Plaintiff in error apparently concedes upon his brief that the court correctly construed the language of the second and fourth articles, but contends that the first and third were ambiguous, and should have been left to the jury. The contention is frivolous. No intelligent man reading these articles could fail to understand that the author of the first one charged an agent through whose hands moneys of a corporation passed, not only with being short in his accounts $28,000, but also with openly boasting of the manner in which he was helping himself to the company's funds. Nor could the intelligent reader fail to understand that the third article charged that Halberstadt had been given unlimited opportunities to swindle and deceive the policy holders, and had availed himself of such opportunities. If these excerpts do not charge the crime of embezzlement, they do certainly charge disgraceful conduct, exposing the party assailed to odium and contempt. And there is no ambiguity about the language used.[1]

Defendant's counsel asked the court to charge that the words in the first article, "Halberstadt, Beers' Mexican agent, is short in his accounts," do not necessarily impute dishonesty. The court charged that "these simple words do not necessarily and of themselves, without anything else in the case, impute dishonesty;" but added that "the entire article, as set forth in that clause of the complaint, is libelous." This was all defendant was entitled to, for the article must be considered as a whole; and if, as a whole, it is libelous, the circumstance that it contains some innocuous statements will not relieve defendant from responsibility for its publication. The exceptions to this part of the charge are therefore unsound. * * *

[1] See also Smith v. Sun Printing Assn., 55 Fed. 240.

Whether the publication referred to the plaintiff is normally a question for the jury, Ball v. Evening American, 237 Ill. 592.

CAPITAL AND COUNTIES BANK v. HENTY.

L. R. 7 Appeal Cases, 741. [*1882.*]

This is an action of libel, the issues in which have been tried before the Lord Chief Justice and a jury; the jury disagreed and there was no verdict; before the case could be set down again the defendants applied to the Common Pleas Division to enter judgment for them in accordance with Order XL, Rule 10, of 36 & 37 Vict. Chap. 66, upon the ground that the court had before it all the materials necessary for finally determining the matters in dispute without the verdict of a jury. The Common Pleas Division refused the application, which has, however, been acceded to, and judgment entered for the defendants, by the Court of Appeal. It is from that judgment that the present appeal is made.[1] * * *

Lord BLACKBURN. My Lords, the plaintiffs' claim is thus stated: "1. The plaintiffs are bankers, and the defendants are brewers. 2. The defendants falsely and maliciously wrote and published of the plaintiffs the letter following: 'Messrs. Henty & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank (late the Hampshire and North Wilts). Westgate, Chichester, 2d December, 1878.' Meaning thereby that the plaintiffs were not to be relied upon to meet the cheques drawn on them, and that their position was such that they were not to be trusted to cash the cheques of their customers."[2] * * *

On the trial evidence was given on both sides, and on the proof being completed the case was left to the jury, who did not agree, and were discharged. The plaintiffs desire that the case should go for trial before another jury. The defendants' contention is, that they are entitled to judgment on the ground that, if the jury had found in favor of the plaintiffs every circumstance relating to the publication which the evidence could prove, and even though the jury had found that, in their opinion, the letter was libelous, the court ought to come to the conclusion that the letter published under those circumstances was no libel, and acting on

[1] Statement by Lord Penzance. On account of the great length of this case his dissenting opinion has been omitted.

[2] The evidence showed that the letter was written and published as a result of a business dispute between the parties.

its own conclusion give judgment for the defendants, not setting that verdict aside as not satisfactory, but letting it stand and giving judgment for the defendants, notwithstanding that verdict. If this is right, it follows that the case ought not to be sent to another jury.

The decision of the cause depends, first, on the question what is the province of the court in an action for libel, and whether, where the writing is such that opinions might differ as to whether it is a libel or not, the court can give judgment for the defendant, on the ground that, though the jury have found that in their opinion the writing is a libel, the court do not think it made out to be a libel; that is a question of great public interest; secondly, whether, supposing that this can be done, the state of the evidence in this case as to the publication is such that the court ought to come to the conclusion that this is no libel. This is of importance to the parties, but except in so far as it may illustrate the meaning of the first general proposition, it is not of general importance. I have had and still have very great difficulty in making up my mind on this second branch of the case. I will first state my opinion on the first question.

A libel for which an action will lie, is defined to be a written statement published without lawful justification, or excuse, calculated to convey to those to whom it is published an imputation on the plaintiffs, injurious to them in their trade, or holding them up to hatred, contempt, or ridicule. It must be shown by evidence that there was a writing, and that it was published. I shall afterwards say something as to what publications are privileged, so as to afford a lawful justification or excuse for the publication, though calculated to convey a libelous imputation. But, independently of all questions as to privilege, the manner of the publication, and the things relative to which the words are published, and which the person publishing knew, or ought to have known, would influence those to whom it was published in putting a meaning on the words, are all material in determining whether the writing is calculated to convey a libelous imputation. There are no words so plain that they may not be published with reference to such circumstances, and to such persons knowing these circumstances, as to convey a meaning very different from that which would be understood from the same words used under different circumstances.

I think that from the earliest times it has, by the law of Eng-

land, been the province of the court to say whether words published in writing were a libel or not; and in order that a court of error might have before it the materials for enabling it to say whether the decision of the court below was right or not, the plaintiff was, by the old rules of pleading, required to place all those materials, on which he relied, upon the record. The words themselves must have been set out in the declaration or indictment, in order that the court might be able to judge whether they were a libel or not. And this still remains the law (see Bradlaugh v. The Queen, 3 Q. B. D. 607; Harris v. Warre, 4 C. P. D. 125).

In construing the words to see whether they are a libel, the court is, where nothing is alleged to give them an extended sense, to put that meaning on them which the words would be understood by ordinary persons to bear, and say whether the words so understood are calculated to convey an injurious imputation. The question is not whether the defendant intended to convey that imputation; for if he, without excuse or justification, did what he knew or ought to have known was calculated to injure the plaintiff, he must (at least civilly) be responsible for the consequences, though his object might have been to injure another person than the plaintiff, or though he may have written in levity only. As was said in the opinion of the judges delivered in the House of Lords during the discussion of Fox's Bill, I think quite justly, no one can cast about firebrands and death, and then escape from being responsible by saying he was in sport.

If there were circumstances relating to the publication which it was alleged caused the words to bear a more extended sense than they would otherwise do, the law was that those must be stated on the record, in order to enable the court to judge whether the words understood with reference to those circumstances bore that more extended sense, or else those circumstances could not be looked at in favor of the plaintiff. Great nicety was required in setting out those circumstances, and the rule of pleading has been altered in that respect by the Common Law Procedure Act, 1852, and the Judicature Act; but the law which gave rise to the old mode of pleading has not been altered by those acts. I shall say more as to the effect of this change in the mode of pleading afterwards. It never was disputed that there was much which could only be decided by the jury. Whether the words as published bore the meaning alleged where there was an in-

nuendo, or any libelous imputation where there was no innuendo, was a question which the defendant could raise on the general issue, and the jury must decide that question when raised.

But there were a series of decisions, the last and most important of which was the famous case of the Dean of St. Asaph. The fullest and best report of that case is that prepared by Lord Glenbervie, and published under the name of R. v. Shipley, 4 Doug. 73. The headnote, I think very accurately, states what was decided by the majority of the court. "On the trial of an indictment for a libel the only questions for the jury are the fact of publication, and the truth of the innuendoes. The question of libel or no libel is necessarily a question of law for the sole consideration of the court out of which the record comes, and on which the judge at the trial is not called upon to give his opinion to the jury." Lord MANSFIELD laid it down that "by the constitution the jury ought not to decide the question of law whether such a writing, of such a meaning, published without a lawful excuse, be criminal. They cannot decide it against the defendant, because after verdict it remains open upon the record; therefore it is the duty of the judge to advise the jury to separate the question of fact from the question of law; and as they ought not to decide the law, and the question remains entire upon the record, the judge is not called upon necessarily to tell them his opinion. It is almost peculiar to the form of prosecution for a libel that the question of law remains entirely for the court upon the record, and that the jury cannot decide it against the defendant; so that a general verdict that the defendant is guilty is equivalent to a special verdict in other cases. It finds all which belongs to the jury to find, and finds nothing as to the question of law. Therefore when a jury have been satisfied as to every fact within their province to find, they have been advised to find the defendant guilty, and in that shape they take the opinion of the court upon the law." (4 Doug. 164, 165.) * * *

It seems to me clear that whilst Lord MANSFIELD held that the question of libel or no libel was one exclusively for the court, WILLES, J., held that it was also a question for the jury; but he did not hold it to be a question exclusively for the jury. On the contrary, whilst holding that if the jury found the defendant not guilty it was conclusive in his favor, he expressly held that after a verdict of guilty it still was competent for the defendant to take the opinion of the court as to whether the publication was

libelous or not. He says (p. 176), "If it" (the tract which the dean had published) "contains nothing but what Lord SOMERS would have approved, and the Convention Parliament have warranted" (which is what the dean had asserted in an advertisement) "then the publication is harmless and inoffensive; but if it tends to excite the people to take arms, to alter the established representation of this country without the consent of Parliament, it may not only be seditious but nearly treasonable. I give no opinion upon this head, as this will be a proper subject of discussion if a motion is made in arrest of judgment." A motion was made in arrest of judgment, and the judgment was arrested. I have never seen any report of the grounds on which the judgment was arrested.

It is no longer material whether Lord MANSFIELD or WILLES, J., was right in his view of the law as it stood in 1784, for by 32 Geo. 3, c. 60, it is enacted by the first section what the law shall be in future. The legislature has adopted almost the words and quite the substance of that part of WILLES', J., judgment which I have first quoted; and from that time, A. D. 1792, there can be no doubt that a defendant cannot be convicted of libel unless the jury find that the tendency of the publication was libelous. But the legislature, passing an enactment in favor of defendants, had no intention to put them in a worse position than before, and to make the verdict of a jury conclusive against the defendants. Nor did they enact that the judge might not in this, as in other criminal cases, direct the jury to acquit because he thought that the case had failed in law; it would, I think, have been very injudicious to do so, for jurors are sometimes excited against defendants, though more commonly they are excited in their favor. And the legislature by the fourth section provided that the defendant should still, though found guilty by the jury, have the power to take the opinion of the court on the question of law, by moving in arrest of judgment as before that act.

The case of R. v. Shipley (4 Doug. 73) was a criminal proceeding at the instance of the crown, and 32 Geo. 3, c. 60, is in terms confined to such proceedings. But though no doubt the court has more power to set aside verdicts in civil cases, there is no reason why the functions of the court and jury should be different in civil proceedings for a libel and in criminal proceedings for a libel. And accordingly it has been for some years generally

thought that the law, in civil actions for libel, was the same as it had been expressly enacted that it was to be in criminal proceedings for libel.

It certainly had always been my impression that there was a difference between the position of the prosecutor, or plaintiff, and that of the defendant. The *onus* always was on the prosecutor or plaintiff to show that the words conveyed the libelous imputation, and if he failed to satisfy that *onus*, whether he had done so or not being a question for the court, the defendant always was entitled to go free. Since Fox's act at least, however the law may have been before, the prosecutor or plaintiff must also satisfy a jury that the words are such, and so published, as to convey the libelous imputation. If the defendant can get either the court or the jury to be in his favor, he succeeds. The prosecutor, or plaintiff, cannot succeed unless he gets both the court and the jury to decide for him.

Now it seems to me that when the court come to decide whether a particular set of words published under particular circumstances are or are not libelous, they have to decide a very different question from that which they have to decide when determining whether another tribunal, whether a jury or another set of judges might, not unreasonably, hold such words to be libelous. In fact, whenever a verdict has passed against a defendant in a case of libel, and judgment has been given in the court below, those who bring their writ of error on the ground that there was no libel, assert that both the jury and the court below have gone wrong; but they are not called upon to say that the words were incapable of conveying the libelous imputation; it is enough if they can make out, to the satisfaction of the court in error, that the *onus* of showing that they do convey such an imputation is not satisfied; and there are numerous cases in which, after a verdict for the plaintiff and judgment for him, that judgment has been set aside in error.

It was argued by the appellants' counsel at your lordships' bar that, if the words were capable at all of conveying the libelous imputation, the plaintiff had a right to have the question left to the jury. I asked for authorities for the proposition laid down by the plaintiffs' counsel in addition to the expressions used by GROVE, J., and DENMAN, J., which certainly look as if those learned judges took that view. Two, and only two, authorities were produced. Some expressions used by WILDE, C. J.,

in delivering the judgment of the Exchequer Chamber in Sturt v. Blagg (10 Q. B. 908) were cited, but they, I think, do not bear the meaning supposed. No question of this kind was before the court. * * *

The other case relied on as an authority was Hart v. Wall (2 C. P. D. 146), where the Common Pleas, consisting of Lord COLERIDGE and LINDLEY, J., set aside a nonsuit entered by ARCHIBALD, J., after consulting QUAIN, J. * * *

And it may be that it was thought not only that it was for the jury to find the meaning (which Lord MANSFIELD admitted), and also that the jury were not bound to find for the plaintiff, whatever the court might think, unless the jury thought the publication such that the meaning was calculated to convey a libelous imputation—which since Fox's act, if not before, I think is the law—but also that if the jury found those questions for the plaintiff it was conclusive on the court, unless they could see that the words were incapable of conveying such an imputation; and if such was the decision in Hart v. Wall it is an authority for the argument of the plaintiffs' counsel, and as far as I know the only one. And I think there is authority against it. * * *

I may observe here that I agree with what was argued at the bar, that Fisher v. Clement (10 B. & C. 472) shows that the real question was not what was the intention with which the libel was published, but what was the tendency of the libel as published; and consequently that ABBOTT, C. J., if correctly reported, made the same verbal slip in Goldstein v. Foss (6 B. & C. 154), which he afterwards, as Lord TENTERDEN, made in Fisher v. Clement. But subject to this slight correction, I think ABBOTT, C. J., here states not only that it was a question for the court whether the publication was shown to be libelous, but correctly states the principle on which the court is to proceed, viz., that unless the plaintiff has so far satisfied the *onus* which lies on him to show it to be a libel that the court can, with sufficient certainty, say that the writing has a libelous tendency, they should not so say. The plaintiff in Goldstein v. Foss did not submit to this judgment. He brought error, but the judgment was affirmed (2 Y. & J. 146).

The Common Law Procedure Act, 1852, § 61, was intended to remove the difficulties which a plaintiff had in putting a real cause of action on the record, with sufficient technical precision. But it was not intended to alter the law, or to deprive the defend-

ant of his right to ask the court to say that words alleged to be a libel, or actionable slander, though found by the jury to be so, were not so in the judgment of the court. It deprived him of his right to move in arrest of judgment, for the materials, on which the question whether the words written or spoken were used in the defamatory sense has to be decided, are no longer on the record. But when the proof is complete, and all that can be properly found on that proof in favor of the plaintiff is found for him, the court have, I think, exactly the same power that they had before, and if they are of opinion that if all which could be found had been put on the record under the old system, the judgment would have been arrested, they should give judgment for the defendant. This was done, and I think rightly done, in Mulligan v. Cole (Law Rep. 10 Q. B. 549).

This brings me to the question on which there has been a difference of opinion amongst the judges of the Court of Appeal, and on which I have felt and still feel great difficulty, namely, whether the evidence here was such as would justify a jury in finding that the publication was such, and so made, that the court would not say, after a verdict for the plaintiff, that the court thought it not sufficiently shown to be a libel. * * *

The question, therefore, seems to me whether, by showing such a publication the plaintiffs have so far satisfied the *onus* which is on them, that the court can (to adopt Lord TENTERDEN'S language) with reasonable certainly say that the tendency of the letter was to convey the libelous imputation.

There can be no doubt that the defendants were not required to take checks drawn on this bank on account of any debts due to them, or in any other way whatsoever, and had a right to refuse to do so. No reason was needed to justify such a refusal. Such a refusal could not be made without using words which, whether written or spoken without sufficient occasion to give rise to a privilege, would be actionable if the tendency of those words would be to cast a doubt on the credit of the bank. I think, however, that there are so many reasons why a person may refuse to take on account the checks drawn on a particular bank, that, acting in the spirit of what Lord TENTERDEN said in Goldstein v. Foss, the court could not say that the letter, which in terms goes no further than merely to state the fact, was libelous, as tending to impute a doubt of the credit of the bank. No doubt some people might guess that the refusal was on that ground,

but as BRETT, L. J., says, it is unreasonable that when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document. I do not think it libelous by itself to state the fact. But I quite agree that such a statement might be published in such a way, and to such persons, as to show that its natural tendency would be to convey an impression that the person refusing to take the checks on that bank did doubt its credit, and then it would be libelous. * * *

I think, therefore, that the only question is whether there was here evidence from which such facts could be found as, in the opinion of the court, would satisfy the *onus*, which, I think, lies on the plaintiffs, to show that this publication had a libelous tendency. And as I am of opinion that there was not, I think that the judgment should be affirmed.

Judgment appealed from affirmed; and appeal dismissed with costs.

GREENWADE v. MILLS.

31 Mississippi, 464. [*1856.*]

HANDY, J., delivered the opinion of the court.

This was an action brought by the defendant in error for a malicious prosecution instituted against him by the plaintiff in error, in causing him to be arrested and imprisoned upon a charge of stealing a negro slave, the property of the plaintiff in error, of which charge he was acquitted. * * *

On the part of the defendant it was proved that the slave in question had been the property of John M. Burnett, who, while the slave was an infant, had made a verbal gift of her to one Mrs. Elliott, who took possession and held her for more than a year, and sold her to one Cain, by whom she was given to his daughter, the defendant's wife; that she remained in the possession of Greenwade from some time in the year 1844 until December, 1849, at which time the plaintiff came to the premises of the defendant late at night, or about daybreak, on horseback, and clandestinely took the slave from the defendant's negro cabins, and placing her behind him on his horse, rapidly fled, taking her away; that when Burnett made the gift to Mrs.

Elliott he was about sixteen years of age, but that he became of lawful age in July, 1847; and in January, 1848, that he acknowledged he had given the slave to Mrs. Elliott and stated that he made no claim to her, and was willing to make a deed of gift, or a bill of sale to Mrs. Elliott, or to the defendant, if he knew to which of them to make it. * * *

The verdict being for the plaintiff, the defendant moved for a new trial upon several grounds; which motion being overruled, exceptions were taken, upon which the case is brought here.

The first objection made is to the instructions granted at the instance of the plaintiff.

The second instruction granted at the plaintiff's instance is, that "if the jury believe, from the evidence, that Greenwade knew that Mills had title to the slave at the time of the arrest, and if they further believe that Greenwade had no title to said slave, then they must find for Mills, and assess such damages as, in their opinion, the plaintiff ought to have." * * *

But the latter branch of the instruction is clearly erroneous in referring the question whether the defendant had title to the slave, to the jury. If left to them to determine whether, under the facts shown in behalf of the plaintiff, and on the part of the defendant, the defendant had title—this was submitting a question of law to the jury. It was the duty of the court to instruct the jury that if they believed, from the evidence, the particular facts relied on by the plaintiff to exist, then the title was in him; and to give a similar instruction with reference to the facts upon which the defendant's title rested. Thus the law, applicable to the question, would have been settled by the court, and the facts to which it might apply, submitted to the jury. But by this instruction the entire question of title, both as to law and fact, was referred to the jury. * * *

Judgment reversed.

HUMPHRIES v. PARKER.

52 Maine, 502. [*1864.*]

WALTON, J. * * * 2. The defendant complains that the question of probable cause was left to the jury, when it should have been decided by the court; and that the instruction as to

what constitutes probable cause was erroneous. The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to show it probable are true and existed, is a matter of fact for the jury. But whether, supposing them true, they amount to probable cause, is a question of law for the court. The exceptions fail to satisfy us that anything more was left to the jury in this case than legitimately belonged to them. Nor are we able to discover any error in the instructions of the presiding judge as to what constitutes probable cause. He told the jury that there is a want of probable cause, when a party institutes a prosecution without reasonable grounds for believing the party guilty. This was undoubtedly correct. He then defined reasonable grounds to be such as would warrant an impartial and candid mind, exercising ordinary care, caution and discrimination, in believing a party guilty. This we think was correct. He then told the jury that probable cause did not always depend upon the real and exact facts, but might depend upon the honest belief of the party prosecuting, but that it must be a belief honestly entertained, and derived from facts and evidences which in themselves were sufficient to justify a man who was calm, and not governed by passion, prejudice or want of ordinary caution and care, in believing the party guilty. This, also, we think correct. There is no doubt that actual belief, and reasonable grounds for that belief, are essential to constitute probable cause. However strong the evidence might be, yet, if the party prosecuting did not believe the party was guilty, he would not be justified in prosecuting him. Nor is mere belief enough; for, if this were so, the court would never be required to judge of the sufficiency of the grounds for that belief, as the law now requires them to do. Belief, and reasonable grounds for that belief, are undoubtedly both essential elements in the justification of probable cause. We see nothing to disapprove of in the instructions of the presiding judge, bearing upon the question of probable cause. They seem to be in accordance with the best and most approved authorities.

Either party, upon request, would have been entitled to a direct and specific instruction from the presiding judge, as to whether the alleged facts set up in defense, if proved, did or not show want of probable cause; but no such request seems to have been made, and the omission, therefore, to give more specific instructions furnishes no valid cause for exception. * * *

LISTER v. PERRYMAN.

L. R. 4 English & Irish Appeals, 521. [*1870.*]

This was an appeal against a judgment of the Court of Exchequer Chamber, which affirmed a previous judgment of the Court of Exchequer, discharging a rule obtained on behalf of Mr. Lister (the original defendant) for setting aside a verdict which had been obtained against him.

The action was for false imprisonment, and the defendant pleaded, first, not guilty; and, secondly, that a felony (stealing of a rifle) had been committed; that the defendant had reasonable and probable cause for suspecting the plaintiff, and he set out, as the grounds for the suspicion—that the plaintiff had been in the habit of coming to the defendant's premises—had opportunities of seeing where the rifle was kept—on the 4th of March (1867) took it up and said he should like to have it—it was afterwards missed, and, according to the statement of one William Robinson, on the faith of which the defendant acted, the plaintiff had the said rifle in his possession for a short time, to-wit, four days, after the said 4th of March, wherefore defendant gave him into custody, etc.[1]

[1] In actions for false imprisonment it has always been thought necessary to plead the specific facts relied on as giving probable cause to arrest on suspicion, Steamship Co. v. Williams, 69 Ga. 251. At one time the pleading was apparently the same in actions for malicious prosecution. In Pain v. Rochester, Cro. Eliz. 871, an action for malicious prosecution, GAWDY, J., doubted whether such a plea was proper because it amounted to *non culpabilis*, but the other justices held, "that it was a good plea *per doubt del lay gents;* for that he confessed the procurement of the indictment, and avoided it by matter in law; especially, the demurrer being general, he shall not take advantage thereof. Wherefore it was adjudged for the defendant." In Winsmore v. Grenbank, Willes, 577, in a different field of tort, it was said:

"But, to be sure, it must be an unlawfully procuring, and that brings me to the second objection. It is not necessary to set forth all the facts to show how it was unlawful; that would make the pleadings intolerable, and would increase the length and expense unnecessarily. It was said however that at least it was necessary for the plaintiff to add 'by false insinuations;' but it is not material whether they were true or false; if the insinuations were true and by means of those the defendant persuaded the plaintiff's wife to do an unlawful act, it was unlawful in the defendant.

"In answer to the objection that this is leaving the law to the jury,

The plaintiff took issue on these pleas; and the action was tried before the Lord Chief Baron at the sittings after Trinity term, 1867. * * *

The Lord Chief Baron directed the jury that if Lister had received the information from Hinton and Robinson, and believed their statements, that would constitute reasonable and probable cause, but if Lister had acted on the statement of Hinton alone, and had not seen Robinson before he gave the plaintiff into custody, then there would be no reasonable or probable cause, and the verdict must be for the plaintiff. The jurors found that Lister had not seen Robinson before the arrest, but believed and acted on the statement of Hinton, and they gave a verdict for the plaintiff with £100 damages. * * *

Lord COLONSAY. My lords, I have listened to this case with much interest, finding myself placed in what is to me the somewhat novel position of having to deal with the question of want of reasonable and probable cause as a question of law for the court, and not a question of fact for the jury. I have frequently had to deal with cases of this kind in the other end of the island; but there this question of want of reasonable and probable cause is treated as an inference in fact to be deduced by the jury from the whole circumstances of the case, in like manner as the question of malice is left to the jury. If I had tried the case there I should have left this matter to the jury; and if the jury had found a verdict for the defendant, I should have approved of that verdict for reasons I am about to explain. If, on the other hand, the jury had found for the plaintiff, still, being a matter so much within the province of the jury, and as it could not be said that they had gone decidedly wrong and contrary to evidence, I should have held that it was not a case for the court to interfere. But in England it is settled law that this is a matter

it must be left to them in a variety of instances where the issue is complicated, as, *burglariter, felonice, proditorie, devisavit vel non, demisit vel non.* But the judge presides at the trial for the very purpose of explaining the law to the jury, and not to sum up the evidence to them."

For the difference in the scope of the general issue in actions for false imprisonment, and in malicious prosecution, see Panjiris v. Hartman, 196 Mo. 539.

In Panton v. Williams, 2 Q. B. 169, the court calls attention to the change in pleading which has taken place in actions for malicious prosecution. Weaver v. Ward, Hobart, 134, indicates that the question of negligence was dealt with in much the same way at that time (1616).

for the court to deal with. The court deals with it as an inference to be drawn by the court from the facts, but whether an inference of law or an inference of fact does not, I think, appear from the reports. I do not see clearly whether it is called an inference of law merely because it is left to the court, or whether it is left to the court because it is really an inference of law.[2] But, undoubtedly, it appears to be settled law in this country that want of reasonable and probable cause is matter for the court. This appears, not only from the latest case that has been alluded to, Panton v. Williams (2 Q. B. 169), but was very authoritatively laid down in the earlier case of Johnstone v. Sutton (1 T. R. 545), in which the opinions of Lord MANSFIELD and Lord LOUGHBOROUGH were adduced in support of the proposition that such was the law of England. Probably it became so from

[2] Terry, Anglo-American Law, § 66: "A difficulty in distinguishing between propositions or questions of law and of fact occurs in two classes of cases; and first, in what are correctly called mixed propositions or questions. Such a proposition arises when two or more distinct and separate propositions of different characters are combined in one expression, and yet each one is capable of being detected by analysis and separately stated. The mixture is caused entirely by abbreviation; it is a mere matter of the use of language. For example, the proposition that A and B are partners includes in a condensed form the statement of fact that they have done certain acts, such as making a written agreement in certain terms, and the statement of law that the legal effect of those acts is to put them into the condition of being partners."

§ 69: "When a mixed question arises there is no theoretical difficulty about the disposition of it. The questions of law are to be decided by the court and the questions of fact by the triers of fact. In jury trials the court must tell the jury what the law is on each of the states of fact which appear probable on the evidence, and the jury, having found which of these possible states of fact is the true one, must apply the rule of law given them by the court, and so, by a conclusive legal inference, decide upon their verdict. If it is quite plain on the evidence that there is only one state of facts that a right-minded jury can find to be true, then if they bring in a contrary verdict the court will presume that they have misapplied the law and will set such a verdict aside as often as it is given. The jury will not be allowed to take the law into their own hands, and by a general verdict, at least in civil cases, decide the whole of a mixed question of fact and law."

§ 74: "It will be noticed that all questions of curial fact have one common characteristic; they are questions which, so far as their own nature goes, might be questions of law. Some questions are essentially incapable of being answered by rule, for example, whether A promised

anxiety to protect parties from being oppressed or harassed in consequence of having caused arrests or prosecutions in the fair pursuit of their legitimate interests, or as a matter of duty, in a country where parties injured have not the aid of a public prosecutor to do these things for them.

Finding that I had to deal with this as a matter of inference in law, I was desirous to ascertain what were the rules or principles of law by which the court ought to be guided in drawing that inference. I did not find that there were any. Neither in the very able argument we heard from the bar, nor in the judgments set out in these papers, nor in the cases that have been referred to, are any such rules or principles enunciated. I think it is laid down by the learned Lord Chief Baron that it is a

to pay B one hundred dollars or whether A's pigs got into B's garden and how much damage they did there. But the impossibility above insisted upon of deciding all questions of construction, reasonableness, admissibility of evidence and other matters of curial fact by rule is of a different sort, consisting merely in the practical impossibility of foreseeing all the material facts. If the precise words in which A would thereafter make his will could be laid before the Legislature, it would be perfectly possible for them to determine beforehand by a law how such words should be construed. So they could say as well as a jury how fast it would be reasonable to drive a horse in the street if the same facts were known to them before the event as to the jury afterwards, and could embody their opinion in a law applicable to the case. And the same may be said of all other questions of curial fact. They are all to be settled by the application of reason and judgment to certain facts. If the Legislature could get at the facts they might prefer to exercise this reason and judgment themselves directly; but since the facts are not accessible to them they are compelled to leave it to the judges who have the means of knowing the facts."

§ 76: "What are called mixed questions of fact and law are often in reality mixed questions of ordinary and curial fact. Thus it is often said in regard to negligence or probable cause, that the facts as they existed must be found by the jury, and that then whether they amount to negligence or probable cause is a question of law, when the latter question is really one of curial fact."

Holmes, Law in Science, 12 Harvard Law Review, 443:

"In some regions of conduct of a special sort we have to be informed of facts which we do not know before we can draw our lines intelligently, and so, as we get near the dividing point, we call in the jury. From saying that we will leave a question to the jury to saying that it is a question of fact is but a step, and the result is that at this day it has come to be a widespread doctrine that negligence not only is a question for the jury but is a question of fact. I have heard it urged with great vehemence by

mere question of opinion, depending entirely on the view which the judge may happen to take of the circumstances of each particular case. And upon a careful consideration of the decisions, it seems to me impossible to deduce any fixed and definite principle to guide and assist the judge in any case that may come before him. Chief Justice TINDAL'S rule seems almost the only one that can be resorted to, namely, that there must have existed a state of circumstances upon which a reasonable and discreet person would have acted. Now in the system to which I have already alluded it is thought that twelve reasonable and discreet men (as jurors are supposed to be) can judge of that matter for themselves, and that lawyers are not the only class of persons competent to determine whether the information was such as a

counsel, and calmly maintained by professors that, in addition to their wrongs to labor, courts were encroaching upon the province of the jury when they directed a verdict in a negligence case, even in the unobtrusive form of a ruling that there was no evidence of neglect.

"I venture to think, on the other hand, now, as I thought twenty years ago, before I went upon the bench, that every time that a judge declines to rule whether certain conduct is negligent or not he avows his inability to state the law, and that the meaning of leaving nice questions to the jury is that while if a question of law is pretty clear we can decide it, as it is our duty to do, if it is difficult it can be decided better by twelve men taken at random from the street. * * *

"I do not wish to repeat arguments which I published long ago, and which have been more or less quoted in leading text-books. I only wish to insist that false reasons and false analogies shall not be relied upon for daily practice. It is so easy to accept the phrase 'there is no evidence of negligence,' and thence to infer, as the English House of Lords has inferred, as Professor Thayer infers in his admirable Preliminary Treatise on Evidence which has appeared since these words were written, that the question is the same in kind as any other question whether there is evidence of a fact.

"When we rule on evidence of negligence we are ruling on a standard of conduct, a standard which we hold the parties bound to know beforehand, and which in theory is always the same upon the same facts and not a matter dependent upon the whim of the particular jury or the eloquence of the particular advocate. And I may be permitted to observe that, referring once more to history, similar questions originally were, and to some extent still are, dealt with as questions of law. It was and is so on the question of probable cause in malicious prosecution. It was so on the question of necessaries for an infant. It was so in questions of what is reasonable, as—a reasonable fine, convenient time, seasonable time, reasonable time, reasonable notice of dishonor. It is so in regard to the remoteness of damage in an action of contract. Originally in malicious prosecution, probable cause, instead

reasonable and discreet man would have acted upon. For what is it that a judge would have to determine? He would have to determine whether the circumstances warranted a reasonable and discreet man to deal with the matter, that is to say, not what impression the circumstances would have made upon his own mind, he being a lawyer, but what impression they ought to have made on the mind of another person, probably not a lawyer. If I look to the circumstances of this case, as they are here disclosed, and put the question to myself, I come, I own, to the conclusion, that in this case there was not a want of reasonable and probable cause, and consequently that the direction given was not, according to my view, a sound one. * * *

Judgment reversed and rule for a new trial made absolute.

INLAND, ETC., COASTING CO. v. TOLSON.

139 U. S. 551. [*1890.*]

Mr. Justice GRAY delivered the opinion of the court:[1]

* * * The defendant requested the court to give this instruction: "If the jury shall find from the whole evidence that, at the time the defendant's boat was landing at the pier Sham-

of being negatived in the declaration, was pleaded by the defendant, and the court passed upon the sufficiency of the cause alleged. In the famous case of Weaver v. Ward (1 Hobart, 134), the same course was suggested as proper for negligence. I quote: 'As if the defendant had said that the plaintiff ran across his piece when it was discharging, or had set forth the case with the circumstances, so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt.' But about the middle of the last century, when the rule of conduct was complicated with practical details, the court began to leave some of these questions to the jury. Nevertheless, Mr. Starkie, a man of intellect, who was not imposed upon by phrases, very nearly saw the ground upon which it was done, and puts it on the purely practical distinction that when the circumstances are too special and complicated for a general rule to be laid down the jury may be called in. But it is obvious that a standard of conduct does not cease to be a law because the facts to which that standard applies are not likely often to be repeated."

See also Thayer, Preliminary Treatise on Evidence, pp. 224 *et seq.*

[1] For the facts in this case, see *post*, p. 548.

rock, the plaintiff negligently or carelessly placed his left foot between the piles of said pier, or between the piles and the flooring of said pier, or between one of the piles in front of said pier and the flooring thereof, and allowed it to remain there while the boat was departing from said pier, and the foot so placed was injured while in that position, then the plaintiff is not entitled to recover in this action."

The defendant also requested the court to give the same instruction modified by omitting the words "negligently or carelessly."

The court declined to do so, and gave the instruction with those words, and added: "This is upon the hypothesis that you shall first find the facts spoken of and then that the plaintiff negligently or carelessly placed his foot in the position referred to. It, however, *still leaves with you the question, if you should find he did place his foot in such position, whether or not his act in doing that was such negligence as would disentitle him from recovering.* There is a principle which you will bear in mind in regard to that. It is this: That a person in the position of the plaintiff is to keep his wits about him, to be on the alert so as not to be injured, and to exercise such vigilance or care as is proportionate to the hazard of the duty in which he is engaged. For instance, a man should be more cautious if he is running a dangerous engine than if he is sitting as you are now, in a position of safety and attending to his usual avocation. His care must be in proportion to the hazard of his engagement. *There is no proof here to show that this was a dangerous vocation* —standing there attending to that wharf—and yet, nevertheless, there were certain hazards accompanying it, just as there are in almost all positions."

To the refusal to give the modified instruction requested, and to so much of the instructions as is above printed in italics, the defendant excepted.

The court rightly refused to omit the words "negligently or carelessly," as requested, because to do so would be to assume that the plaintiff's placing his foot between timbers of the wharf and keeping it there while the steamboat was leaving was necessarily negligence, as matter of law. The court truly said there was no proof in the case that "standing there, attending to that wharf, was a dangerous vocation;" and properly submitted to the jury upon the whole evidence the question whether the plaintiff exercised due care at the time and place of the injury, and under

the circumstances attending it. The phrase, "such negligence as would disentitle him from recovering," was evidently used as synonymous with "such negligence as contributed to the injury." * * *

PROPER v. L. S. & M. S. RY. CO.

136 Michigan, 352. [*1904.*]

HOOKER, J. The plaintiffs' intestate was instantly killed by the defendant's passenger train at a street crossing in the village of Jonesville. At the time he was driving in a buggy, and his horse was struck when he had but just stepped his fore feet upon the track. The action is case for negligence, and the case was left to the jury, who found a verdict for the defendant, and plaintiffs have appealed. * * *

The court instructed the jury as follows:

"If you find that Mr. Proper did all that the ordinarily careful and prudent man would do under like circumstances, and with his knowledge of this crossing, and of the trains passing over it, in approaching this crossing, to ascertain if any train was coming on this track, then and in that case he is not guilty of contributory negligence, and, so far as that question is concerned, plaintiffs would be entitled to recover.

"Contributory negligence, in the law, may be defined as an act by the injured person which an ordinarily prudent man would not have done under the same circumstances, or the omission to do that which an ordinarily careful and prudent man would have done under the circumstances, and which act or acts directly aid in causing or contributing to the injury received. If the mind of an ordinary prudent man would be impressed with the belief of danger, under the circumstances existing and surrounding him at the time of the injury, he has no right to incur the danger. But, on the other hand, if the mind of an ordinarily prudent man would not be impressed with the belief of danger by the circumstances surrounding and existing at the time of the injury, he is not guilty of contributory negligence.

"Therefore, you will understand that it is a very important question in this case for you to determine whether or not the deceased, George W. Proper, was exercising the care and caution

which he should have exercised as he approached this track, for, unless it be shown that he gave proper attention—that is, exercising due and proper care in the question of whether there was an approaching train—then he cannot recover; and if the train was easily to be seen, had he stopped and looked for it, or had looked attentively enough without stopping, and the approaching train would have been seen by him if he had used due care and caution and given proper attention, then he was guilty of such a degree of negligence as would prevent a recovery in this case.

"There is no particular act necessary to be found on which to base contributory negligence. It may exist in a variety of ways. It may be inferred from the failure of the plaintiff or decedent to stop his horse or to look in the direction of the approaching train, or a failure to hear the approaching train because of the noise of the buggy, or any other noise, if you find there was any, or by being occupied in conversation with his companion; and various other things which may occur may be considered as contributory negligence. Anything in the way of inattention to the approaching train, which, in the mind of the jury, contributed to the injury of the deceased, and the injury would not have occurred had it not been for such inattention, is contributory negligence. The attention which is required of Mr. Proper is the same attention and observation that is used and exercised by an ordinarily careful and prudent man under the same circumstances. * * *

"You are also instructed that the plaintiffs are not entitled to recover in this case simply because there was an accident which resulted in the death of Mr. Proper, for whom the plaintiffs claim to act as administrators. The fact that Mr. Proper was killed at this crossing is of itself no evidence whatever of any negligence on the part of the defendant, or of any liability on its part to respond in damages. While it is true that, simply because an accident had occurred, negligence is not to be presumed; still, in determining the question of negligence, the fact that an accident has occurred may be and should be taken into consideration, in connection with all the other facts and circumstances in the case, for the purpose of determining whether in fact there was negligence.

"And if you find from the evidence that when Mr. Proper and his companion, Mr. Wisner, had reached a point in the high-

way which was somewhere in the neighborhood of fifty feet or six or seven rods from the track, as estimated by various witnesses, he stopped his horse and looked and listened for the train, then started up again, and, as he started, Mr. Wisner looked out of the glass at the back of the buggy, where he could only see a few rods of the track, and the parties then passed onto the track, without any further looking in the direction of the approaching train, or any further attempt to find whether there was an approaching train, then such acts constituted contributory negligence, and plaintiffs could not recover."[1]

Error is assigned on the last paragraph of the above. The plaintiffs claimed that the view of the track was obscured by buildings and trees, and that it was a difficult and dangerous crossing. We think that the judge was right in holding that, under the admitted circumstances, it would be negligent to assume that it was safe to proceed without any further effort to ascertain than was made at the time of stopping. Vreeland v. Railroad Co., 109 Mich. 585 (67 N. W. 905); Shufelt v. Railroad Co., 96 Mich. 327 (55 N. W. 1013); Braudy v. Railway Co., 107 Mich. 100 (64 N. W. 1056); Osborn v. Railway Co., 115 Mich. 102 (72 N. W. 1114); Britton v. Railroad Co., 122 Mich. 359 (81 N. W. 253); Tucker v. Railway Co., 122 Mich. 149 (80 N. W. 984), and cases cited. * * *

Judgment affirmed.

PENNSYLVANIA CO. v. FRANA.

112 Illinois, 398. [*1884.*]

This was an action brought by Albert Frana against the Pennsylvania Company to recover for a personal injury received by the plaintiff while attempting to cross the railroad track of the defendant with a wagon and team, attributing the accident to the alleged negligence of the defendant's servants in the management of its train. A judgment in favor of the plaintiff in the trial court was affirmed in the Appellate Court, and the defendant brings the cause to this court on his further appeal.

Mr. Justice CRAIG delivered the opinion of the court:

[1] See also Osborn v. Ry., 115 Mich. 102; Elliott v. Ry. 150 U. S. 245.

* * * The court refused defendant's instruction No. 1, which was as follows:

"The jury are instructed that it is the duty of a person, before attempting to cross a railway track, to stop, if necessary, and look and listen for the approach of trains, before entering upon such track; and if the jury believe, from the evidence, that the plaintiff in this case could have discovered the approach of the defendant's train, and avoided the injury in question by having stopped his mule before driving upon the track, and looking and listening for the approach of said train, then he can not recover in this case, unless the jury shall believe, from the evidence, that the agents or servants of the defendants were guilty of gross negligence in the operation of said train."

And this decision is relied upon as error. It is no doubt true that it is the duty of a person about to cross a railroad track, to approach cautiously, and to endeavor to ascertain if there is present danger in crossing; and where the railroad track and crossing are so situated that the approach of a train can not be seen, it may be the duty of a person about to cross, to stop and look, to ascertain if a train is coming; but it is always a question of fact for the jury to determine, from the evidence, whether the person injured has exercised proper care and caution in crossing a railroad track, and not a question of law. It was the province of the jury to determine whether the plaintiff was guilty of negligence, and not for the court to tell the jury that certain facts constituted negligence. The instruction, as drawn, took the question of fact from the jury, and hence was erroneous, and for this reason the court did not err in refusing it. * * *

HUGUENIN v. RAYLEY.

6 Taunton, 186. [*1815.*]

This was an action upon a policy of insurance subscribed by the Albion Insurance Company upon the life of Elizabeth Swayne. Upon the trial of the cause at the Sarum spring assizes 1815 before DAMPIER, J., one defense was, that there had been a fraud in effecting the policy by the suppression of a fact which

the contract required the assured to disclose. It appeared that E. Swayne, who had been many years resident in a house of her own in the parish of Fisherton Anger, but was, in December, 1813, a prisoner for debt in the county gaol in Fisherton Anger, then employed Mather to effect an insurance on her life with the defendants; one condition of the insurance was, that a declaration should be made of the state of the health of the life insured, and Mather, reciting that he had proposed on the behalf of Elizabeth Swayne of Fisherton Anger an insurance on her life, which had been accepted on the declaration then following, declared that E. Swayne did not exceed the age of 66 years, and that she was then resident as above; it was stipulated that the policy should be valid, only if the statement were free from all misrepresentation or reservation. For the purpose of ascertaining the state of her health, Mather, by the direction of the defendants, called in a physician, who found the subject in the gaol, which is in a situation perfectly healthy, confined in a large airy room, well calculated to preserve the health of its inhabitants. She was apparently about 60 years of age, a fresh-looking, healthy, hale woman, making allowance for her confinement; for confinement makes some difference in the state of health. He certified that she was in good health, and he would have noticed on his certificate the fact of her being in jail, had he not been led by the circumstance of Mather's speaking of the defendants by the term "our office," to suppose he was an agent of the defendants, and that all which he knew would be communicated, for the witness thought it a fact material to the terms of the contract to be communicated. Upon this evidence, DAMPIER, J., thought that Mather had by contrivance prevented the physician from stating a fact to the defendants, which he thought material to the contract, and he therefore stopped the plaintiff's case, and without hearing the defendant's case directed a nonsuit. * * *

On this day the court relieved Best from supporting his rule. They observed that they had examined the documents, and there was nothing express in the terms of the policy which required the imprisonment to be stated, nor was there an omission of the statement of any matter which the office called for; nevertheless, if the imprisonment were a material fact, the keeping it back would be fatal; but it ought to have been submitted to the jury,

whether the omission of the fact relied on was or was not a material omission,[1] therefore there must be a new trial.

Rule absolute.

CASWELL v. HUNTON.

87 Maine, 277. [*1895.*]

This was an action for false and fraudulent representations in the sale of personal property. Verdict for the defendant.

The declaration alleged that the defendant, in order to induce the plaintiff to buy of him twenty-five shares in the capital stock of a corporation known as the "National Carving Company," and pay him therefor the sum of five hundred dollars, falsely and fraudulently represented to the plaintiff "that said National Carving Company was just starting into business, and needed a little more money to get the business well started; that the company then and there had large orders to fill, and that he (the defendant) was then selling treasury stock to raise money to do

[1] See also Bufe v. Turner, 6 Taunton, 338, where the materiality of matters not disclosed was left to the jury.

MARSTON, J., in Hall v. Johnson, 41 Mich. 286: "When the court came to charge the jury—to give them instructions for their guidance when they would retire to deliberate —nothing was said as to the materiality of the representations, if any were made and found to be untrue. Irrespective of their materiality, the jury were instructed that if false representations were made upon which Mrs. Young relied, and which induced her to part with the note, plaintiffs could not recover. We are of opinion that even in this part of the charge the court must have had in mind material false representations, as she would not be likely to have relied upon immaterial representations or parted with the note upon the strength thereof. This view is most favorable to the plaintiff in error, and yet will not help him. False representations, no matter how acted upon, will not be sufficient to set aside an agreement otherwise valid unless they were material. Immaterial representations, whether true or false, cannot be made the basis of relief, even although coupled with the assertion that they were relied upon. They may constitute a moral wrong, but not a legal one. False representations may be made of such a character that no person of ordinary intelligence could be misled thereby, and that could have had no influence whatever in inducing the other party to enter into the agreement. What might be considered sufficiently material to induce one person to act,

business to fill said orders; that the stock he (the defendant) was then selling was treasury stock of said corporation; that one F. W. Parker, one Frank R. Conant, one J. L. H. Cobb, and one C. I. Barker, were then owners of similar treasury stock purchased by them respectively of the corporation, at the same price he was paying; that he was and had been since the company came to Maine, about a year before, the agent of said corporation to sell its treasury stock for the purposes aforesaid; and that as such agent, he (the defendant) had sold to one P. M. Thurlow two hundred and fifty shares of like treasury stock at the same price he was to pay."

The declaration contained all other necessary and material elements to state in legal form the alleged cause of action. The plaintiff contended, and introduced evidence tending to show that the defendant, as an inducement to the sale, made each and all the representations above set forth. There was also evidence tending to show that the stock in question was sold by the defendant to the plaintiff for the sum of five hundred dollars; that the stock so sold was not treasury stock, but the defendant's

might have but little or no influence upon another, so that no definite rule can be laid down. In each case the court or jury must be satisfied that the representations if made were untrue, and as applied to the transaction, were material—of that character that a person of ordinary intelligence and possessing ordinary business qualifications would be likely to rely thereon and be misled thereby."

DEVENS, J., in Penn Mutual Life Ins. Co. v. Crane, 134 Mass. 56: "The plaintiff contends, on the authority of Lindenau v. Desborough, 8 B. & C. 586, and Huguenin v. Rayley, 6 Taunt. 186, that the question whether the fraud was material or otherwise was a question of fact for the jury. This is a misapplication of these and kindred cases in the law of insurance, where it has been held that whether facts concealed or misrepresented increased the risk assumed by the insurer was to be determined by the jury. In such cases, it is always determined by the court, upon consideration of the contract, what is the character of the concealment or misrepresentation of facts which will invalidate the contract, and for the jury only to ascertain whether, within the definition thus given, there has been a material concealment or misrepresentation of them. In the case at bar, it was for the jury to decide whether the false and fraudulent statements alleged were made, and for the court to determine their effect upon the contract. Evidence was therefore properly admitted to prove these representations to have been made by the plaintiff's agents, and also that they were false and fraudulent."

own stock; that the defendant at the time of the sale, and for some time prior thereto, was the duly authorized agent of the corporation to sell its treasury stock; that neither Parker, Conant, Cobb nor Barker were, or ever had been, owners of similar treasury stock purchased by them respectively of the corporation at the price he was paying; that as such agent (to sell stock) the defendant had never sold P. M. Thurlow two hundred and fifty shares of like treasury stock at the same price he (the plaintiff) was to pay; and that the defendant had the option to sell, and the right to sell the plaintiff treasury stock instead of his own stock. * * *

The plaintiff requested the presiding justice to instruct the jury that the alleged false representation that, "the stock he [the defendant] was then selling to the plaintiff was treasury stock of said corporation," was a material one, and that if the jury should find the other elements of the action present, then they must find the defendant guilty. The defendant's counsel in his argument to the jury admitted the above representation to be material.

The plaintiff, in like manner, requested a similar instruction concerning the alleged false and fraudulent representation, that "one F. W. Parker, one Frank R. Conant, one J. L. H. Cobb and one C. I. Barker were then owners of similar treasury stock of said corporation, purchased by them respectively of the corporation at the same price he [the plaintiff] was paying."

The plaintiff, in like manner, requested a similar instruction concerning the alleged false and fraudulent representation, "that as the agent of the corporation he [the defendant] had sold to one P. M. Thurlow two hundred and fifty shares of like treasury stock at the same price he was to pay."

The presiding justice declined to rule, as matter of law, that any one of the foregoing alleged false and fraudulent representations were material, as requested, but left the question of materiality of each representation to the jury, with proper instructions as to what constituted materiality, to which no exceptions were taken.

WALTON, J. The question is whether the materiality of a false representation, relied upon to support an action for deceit, is a question of law for the court, or a question of fact for the jury.

We think it is a question of law for the court. Most of the

questions involved in an action for deceit are questions of fact for the jury. Whether the defendant made the alleged false representation, and whether, if he made it, he knew it to be false, and whether the plaintiff was ignorant of its falsity, and whether he relied upon it, and was thereby damaged, are undoubtedly questions of fact for the jury. But, assuming all these facts to be proved, the materiality of the representation is a question of law for the court. Penn. Ins. Co. v. Crane, 134 Mass. 56. Bigelow on Fraud, Vol. I, p. 139, and cases there cited.

In the present case, the presiding justice declined to instruct the jury as to whether any one of the alleged false representations was or was not material, but left the question of materiality to the jury. We think this was erroneous. We think it was the right of the parties to have the jury instructed specifically respecting each of the alleged false representations, and to have them told whether or not, if all the other elements of fraud were proved, it was legally sufficient to maintain the action.

The action is for alleged false representations made by the defendant while selling to the plaintiff twenty-five shares of corporation stock. The exceptions state that there was evidence tending to show that the defendant represented that he was selling the stock as agent for the corporation, and at the same price at which similar stock had been sold to other parties. We think these representations were clearly material; that the plaintiff had a right to know with whom he was dealing, and whether the money which he was paying for the stock was going into the treasury of the corporation to increase its working capital, or into the pocket of a stranger, where it would have no such effect. And we think the plaintiff also had the right to know whether others had paid into the treasury of the corporation for their shares the same amount which he was paying. Not because it was important or material for him to know what others had paid for their stock, but because it was material for him to know how much the corporation had received for its stock; for the value of his own stock would depend largely upon the amount of paid-up capital possessed by the corporation. Consequently, the jury should have been instructed that, if they found the other elements of fraud proved, these representations were material and legally sufficient to maintain the suit. Coolidge v. Goddard, 77 Maine, 578; Hoxie v. Small, 86 Maine, 26.

WARNER v. BENJAMIN.

89 Wisconsin, 290. [*1895.*]

This is an action to recover damages for fraudulently inducing the plaintiff to purchase worthless mining stocks. The complaint is set out at length in 75 Wis. 278, when this case was here on appeal from an interlocutory order. The answer of the defendant Bates was a general denial. The answer of the defendants Benjamin admits the purchase of mining stock by the plaintiff of the firm of Moore, Benjamin & Co.; denies all fraudulent or untrue statements, or that plaintiff relied on any information given her by defendants, but that she informed herself as to the facts; alleges that the stock, when sold, was worth what she paid for it, and afterwards greatly increased in value, and that the plaintiff had many opportunities to sell her stock at an advance, but refused to do so.

Upon the trial the jury returned a special verdict, wherein they found: * * * (6) That the defendant H. S. Benjamin represented to the plaintiff, at the time she purchased her stock, that each of said stocks was a good investment at the price she paid; that it was impossible for her to lose thereby; that the property represented by the stock was in good and promising condition; that the mines were being rapidly developed; that ore had been sold, or was ready to be sold, from some of them; and that they, or some of them, would yield dividends in the near future. (7) That the plaintiff relied upon such representations and was induced thereby to purchase her stock. (8) That the defendant Laura D. Benjamin joined in and assented to such representations. (9) That the defendant F. A. Bates represented to the plaintiff that said mines, or some of them, were in a good or promising condition and were certain to pay dividends in the near future. (10) That the plaintiff relied upon the representations made by Bates and was induced thereby to purchase stock or to retain stock after she had purchased it. (11) That the parties making said representations did not honestly believe them to be true when they made them. * * * Upon this verdict judgment was rendered for the plaintiff, and the defendants, Benjamin and wife, appealed, as did also the defendant F. A. Bates.

WINSLOW, J. * * * 4. The representations which the jury

found were made by Benjamin and by Bates will be found fully stated in the statement of the jury's verdict contained in the statement of the case herein. There are certainly some parts of these representations which do not amount to false representations. An actionable false representation must be one relating to an existing fact or past event. A mere opinion, prediction, or promise of a future condition of things is not a representation upon which a party has any right to rely. Sheldon v. Davidson, 85 Wis. 138. In the latter class of promises would certainly fall the statements that it was impossible for the plaintiff to lose upon her investment and that the mines would pay dividends in the near future. These alleged statements, therefore, are entirely immaterial. It may be that, as to the remaining false representations, they may form foundation for a recovery, although they certainly verge very closely upon expressions of opinion or mere prediction as to the future, and they might reasonably be understood as such. The appellants asked that the question whether they were so made and understood be submitted to the jury, and we think such a question should have been submitted.

We have touched upon the main questions presented by the record, and do not deem it necessary to notice many minor questions which are raised but may not occur upon another trial.

By the court: Judgment reversed upon both appeals, and cause remanded for new trial.

SHAUER v. ALTERTON.

151 U. S. 607. [*1893.*]

This action was brought by the plaintiff in error in one of the courts of the Territory of Dakota to recover damages for the alleged unlawful taking by the defendant Alterton of a certain stock of merchandise in a storehouse that had been occupied by Louis S. Shauer, in the city of Mitchell, in that Territory. The defendant justified the taking under attachments in favor of creditors of Louis S. Shauer, which came to his hands as sheriff of the county. There was a verdict in favor of the defendant, and a new trial having been denied, judgment was entered in his favor. That judgment was affirmed by the Supreme Court of

the Territory, and the writ of error in this case was directed to the Supreme Court of the State of South Dakota, as the successor of the Supreme Court of the Territory of Dakota, by virtue of the act of February 22, 1889, Chap. 180, § 22, 25 Stat. 676, 683. * * *

Mr. Justice HARLAN. * * * In view of these statutory provisions, and of the facts which the evidence tended to establish, two principal questions were considered by the court in its charge to the jury: First, whether the transfer of the merchandise in question was made with the intent to delay or defraud the creditors of Louis S. Shauer; second, whether the transfer to his brother was accompanied by such immediate delivery of the merchandise and followed by such actual and continued change of possession as the statute required. * * *

4. Having disposed of the question as to the intent with which the sale in question was made, the court referred to the provision of the statute, declaring the transfer of personal property—the vendor having at the time possession or control thereof—to be conclusively fraudulent and void, as against creditors, unless such transfer is accompanied by an immediate delivery, and followed by an actual and continued change of possession. The court said to the jury that the statute means, as declared by the Supreme Court of the Territory in Grady v. Baker, 3 Dakota, 296, 299, that the sale shall be open and public, that the world may be apprised of the change of ownership; and that the change of possession must be actual and continued, and not subject to some secret trust between the buyer and seller. "Some of the cases," the court below observed, "say that the change must be of that character that customers and those accustomed to frequent the premises may be at once advised of the change of possession by the changed appearance of the property or its change of custody. And this is true, whatever may be the good intention or *bona fides* of the transaction; even the law will not tolerate such transfers as against creditors. The change of possession must be open and visible, and if not, as against creditors without knowledge of the transfer, it will be void, though made for a valuable consideration in good faith and without any actual intent to defraud. In such case the law conclusively presumes a fraudulent intent, and the party to such sale will not be heard to prove the contrary."

In addition to what appears in the charge, the court, at the

instance of the defendant, instructed the jury that a change of the property in controversy in this case must not have been merely nominal and momentary, but real, actual, and open, such as could be publicly known; and that if the property was permitted to remain in the possession of Louis S. Shauer, then the transfer was fraudulent in law as to his creditors, notwithstanding the sale may have been made to his brother in good faith and for a valuable consideration.

The specific objection made by the plaintiff to these instructions is that they stated an arbitrary rule, namely, that the change in possession must be accompanied by such outward, visible signs as would apprise the world of the change, and made no reference to the time within which such signs should be given, or to the nature of the property transferred or to the circumstances attending the transaction. The court, it is said, should have qualified the rule as indicated in the instructions asked by him. We cannot sustain this position. The instructions asked by the plaintiff, on this point, did not substantially differ from those given by the court, except they were more elaborate and referred more in detail to the facts. The court told the jury that the statute required not only an immediate change of possession, but one so open that the public would be apprised of it. While the court was at liberty to recall to the minds of jurors all the facts and circumstances bearing upon this issue, we cannot say that it erred in not doing so, or that it erred in leaving to the jury to determine whether, under all the evidence, there was such immediate delivery and such actual change of possession of the property in controversy as was necessary, under the statute as explained, to make the transfer valid against creditors.

In this connection, it is appropriate to say that the interpretation placed by the court below on the Dakota statute, relating to change of possession accords with the decisions of the Supreme Court of California in respect to a similar statute. In Stevens v. Irwin, 15 California, 503, 507, it was said: "A reasonable construction must be given to this language, in analogy to the doctrines of the courts holding the general principles transcribed into the statute. The delivery must be made of the property; the vendee must take the actual possession; that possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of

the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession—not taken to be surrendered back again—not formal, but substantial." See also Lay v. Neville, 25 California, 545, 553; Woods v. Bugby, 29 California, 466; Parks v. Barney, 55 California, 239. There are many other cases to the same effect. * * *

(b) *Rules governing the charge.*

PEPY'S CASE.

3 Leonard, 80. [*1583.*]

Waste was brought by F. and his wife against Pepy; and declared, that the said Pepy was seized, and enfeoffed certain persons to the use of himself for life, and afterwards to the use of the wife of the plaintiff, and her heirs. The defendant pleaded, that the said feoffment was to the use of himself and his heirs in fee, etc., *absque hoc,* that it was to the uses, as in the count; upon which they were at issue. And it was found by verdict, that the said feoffment was to the uses contained in the count; but further found, that the estate of the defendant by the limitation of the use was privileged with the impunity of waste; *scil.* without impeachment of waste. It was moved, if upon that verdict, the plaintiff should have judgment. ANDERSON and RHODES, Justices, conceived that he should, for that the matter in issue is found for the plaintiff; and that is, the feoffment to uses contained in the count, and this impunity of waste is a foreign matter not within the charge of the jury; and therefore the finding of the same is but matter of surplusage. As if I plead a feoffment of J. S. to which the other pleads, that he did not enfeoff, and the jury find a conditional feoffment, the court shall not respect the finding of the condition, for it was not in issue, and no advantage shall be ever had of such a liberty if it be not pleaded, 30 H. 8. Dyer 41. In dower, the tenant pleaded, *ne unq; seisi que dower,* etc. The tenant pleaded, that before the coverture of the demandant, one A. was seized, and gave the land whereof dower is demanded to the husband of the demandant in tail, who made a feoffment; a stranger took the demandant to wife, took back

an estate in fee, and died seized, having issue inheritable. Now, although upon the truth of the matter she is not dowable *de jure*, yet forasmuch as the parties were at issue upon a point certain, no foreign nor strange matter not in question betwixt the parties shall be respected in the point of judgment; but if the defendant had pleaded it in bar, he might have foreclosed the demandant of her dower. See 38 Ass. 27, 47 E. 19. In a *praecipe quod reddat* upon the default of the tenant, came one and showed, how that the tenant who made default, was but tenant for life of the lands in demand, the reversion in fee to himself, and prayed to be received. The demandant counterpleaded the *resceit, dicendo,* that the tenant had fee, etc., upon which issue was taken; and it was found that neither the tenant, nor he who prayed to be received, had anything in the land. And in that case, the court did not regard the matter which was superfluous in the verdict; for they were at issue upon a point certain; *scil.* whether the tenant was seised in fee. For it is confessed of the one side, and of the other, that he had an estate for life, and of that matter the jury was not charged, and they are not to inquire of that; and so it is found against the demandant, by which the *resceit* was granted. See 7 H. 6, 20. The parties were at issue upon a dying seised, which is found by verdict, but the jury find further, that the other party made continual claim. The said continual claim shall not be respected in point of judgment, because it was not pleaded in avoidance of the resceit, etc. WINDHAM, Justice, to the contrary, because it appeareth to us upon the verdict that the plaintiff hath not cause of action, and therefore he shall not have judgment. As in *detinue,* the plaintiff declares upon a baylment by his own hands; the defendant pleads, *ne detinue pas,* the jury find the *detinue* but upon baylment by another hand. In that case, notwithstanding that the *detinue* be found, yet the plaintiff shall not have judgment. But ANDERSON, RHODES and PERIAM conceived, that in the principal case judgment should be given for the plaintiff; for in no case the party shall have advantage of that liberty of impunity of waste, if he doth not plead it; and the jurors are not to meddle with any matter which is not in issue;[1] and if they do, it is

[1] Anon. 19 H. VI. 47, pl. 101. A writ of trespass was brought against one for an assault made. Portington: We say that on such a day, year and place (*nota* that the day was other than the plaintiff counted) the plaintiff made an assault on the defendant, and the in-

but matter of surplusage, and to no purpose; and afterwards, judgment was given for the plaintiff. See the Number Roll, Pasch, 25 Eliz. Rot. 602.

MORROW v. ST. PAUL CITY RY. CO.

65 Minnesota, 382. [*1896.*]

START, C. J. The plaintiff's intestate, George Morrow, was on March 22, 1895, a conductor in the employ of the defendant, on one of its electric car lines, known as the "Selby Avenue Extension," which connected with its cable line at Milton Street, in the city of St. Paul. While he was engaged, on the day named, in transferring his car from one track to another on the electric line, a cable train collided with the electric car, whereby he received injuries from which he died two days thereafter. This action was brought by his administratrix to recover damages for his death, on the ground that it was caused by the negligence of the defendant. The specific and only acts of negligence on the part of the defendant charged in the complaint are that the gripman operating the cable train was incompetent and unable to manage the same, to the knowledge of the defendant; that the cable, machinery and appliances furnished by the defendant to propel, control and operate the cable train were insufficient and defective. These allegations were put in issue by the answer. There was a verdict for the plaintiff in the sum of $3,500, and the defendant moved the court for a new trial, on the ground,

jury he received was of *son assault demesne, sans ceo* that he is guilty of any assault made before the said day or afterwards. Ready, etc. He pleaded this by leave of court. And NEWTON, J., said that this was the reason, because if a man makes an assault on me on Sunday, and I beat him in my defense, and for this trespass he brings an action and counts that the trespass was done on the Saturday before or the Monday after, or any other day, it is no traverse to say that I did not beat him on the day he alleged. And if I say not guilty generally, and the inquest comes and says that I beat him on another day according to the truth, and that it was done on the assault of the plaintiff, this verdict amounts to guilty: and by this manner of pleading as above I shall be helped. Wherefore it is better to plead thus, and not generally not guilty because of the mischief of the verdict.

among others, that the verdict was not justified by the evidence, and for errors of law occurring on the trial, and excepted to by the defendant. The motion was granted in general terms, without specifying the particular grounds therefor; but, in his memorandum attached to the order granting the motion, the trial judge stated that the defendant was entitled to a new trial, by reason of error on the trial in permitting the plaintiff to cross-examine the gripman of the cable train, who was called as a witness by the defendant, as to his competency.

If this alleged error was the only one in the case, we should find difficulty in affirming the order, for the cross-examination of the gripman did not exceed the reasonable limits which the trial court, in its discretion, had a right to permit. But the reason assigned in the memorandum for making the order is no part of the order, and it will not be reversed if other prejudicial errors of law occurred on the trial, and were excepted to by the defendant.

The court instructed the jury to the effect that the defendant was bound to use due care and caution to provide a safe place for its servants in which to perform the duties assigned to them, and that for any violation of this rule the defendant was liable for damages. The exception to this instruction, and the response of the court thereto, are in these words:

"Mr. Thygeson: I would like at this time to take an exception to that part of the court's remarks, just made, that the defendant is liable in this case because of failure to furnish a safe place in which the servant should be employed, on the ground that there is no such issue in this case. The Court: Well, it is for the jury to say, under all the circumstances, whether the regulation that a man shall get down on the ground, and stand back of his car, at the time when he puts the trolley on, was a regulation or instruction which furnished him a safe place or not, in view of the close proximity of the switch to the other track, and all the surrounding circumstances in the case."

It is to be noted that the attention of the court was by the exception specifically called to the fact that there was no issue in the case as to whether the place assigned to the deceased in which to work was unsafe or not. If it was so in fact, by reason of the conditions suggested by the court to the jury, they may have been obvious to the deceased, and he assumed the risks. We have already stated the only acts of negligence

on the part of the defendant charged in the complaint, and the charge that the defendant was negligent in not furnishing a safe place for the deceased in which to perform his work was neither alleged nor litigated, by consent or otherwise. The giving of this instruction under these circumstances, when the defendant had no opportunity to meet the charge, was clearly prejudicial error, for which the defendant was entitled, as a matter of right, to a new trial.[1]

Order affirmed.

CENTRAL R. R. CO. v. ATTAWAY.

90 Georgia, 656. [*1892.*]

SIMMONS, Justice, after reciting the above facts, said:

1. Several grounds of the motion for a new trial complain of instructions to the jury as to the right of the plaintiff to recover

[1] Accord: Hackett v. Ry., 235 Ill. 116; Indiana Ry. Co. v. Maurer, 160 Ind. 25; Kirkpatrick v. Ry., 211 Mo. 68; Greenthal v. Lincoln, 67 Conn. 372. *Per curiam* in Latourette v. Maldrum, 49 Ore. 397: "It is evident from the averments of the several answers that the defendants relied on the original written agreement as affording a defense to the action and not on any verbal modification thereof, and in such case the question to be considered is whether the court erred in charging the jury as to a fact not in issue, though no exception was taken to the introduction of testimony tending to establish such fact. In Coos Bay R. Co. v. Siglin, 26 Or. 387 (38 Pac. 192), it was held to be reversible error to charge as to an issue not made by the pleadings, though evidence as to the controverted fact was received without objection. It has been repeatedly held that an instruction outside the issues is erroneous, and, if excepted to, the giving thereof in such case is sufficient ground for reversal on appeal: Hughes v. McCullough, 39 Or. 372 (65 Pac. 85); Carson v. Lauer, 40 Or. 269 (65 Pac. 1060); First Nat. Bank v. McDonald, 42 Or. 257 (70 Pac. 901). The several answers failed to allege that the contract of June 30, 1897, had been modified in any manner, and for that reason the instruction objected to is erroneous."

ANDERSON, J., in Ry. v. McWhorter, 156 Ala. 269: "Charge 19, requested by the defendant, was too broad as to contributory negligence. It is only contributory negligence that is pleaded that can defeat a recovery when proven. Southern Ry. v. Shelton, 136 Ala. 191, 34 South. 194. The charge in question is predicated on any contributory negligence, whether pleaded or not."

But in some jurisdictions a verdict may be directed on an unpleaded defense clearly shown by the plaintiff's evidence. Hudson v. Ry., 101 Mo. 13.

for negligence in the manner of handling the tools, as well as negligence in having used them in a defective condition. These instructions were alleged to be erroneous because it was not claimed in the plaintiff's declaration that his injury was caused by the improper handling of the tools. The declaration, however, charged negligence "in using the defective tools," and the plaintiff's evidence tended to show that the negligence consisted in the manner of using them, as well as the fact of having used them in their defective condition; and this evidence was not objected to at the trial. If the allegations in the declaration did not cover negligence in the former respect as well as in the latter, the defendant ought to have objected or moved to rule it out.[1] Had he done so, it would have been allowable for the plaintiff to amend so as to make the declaration more specific. But as the evidence on this point was allowed to come into the case and remain in it without objection, the court was authorized to charge the jury upon the case as developed by the proof. Where a party permits evidence to go to the jury without objection, upon a declaration that is ambiguous, and the jury find on such evidence, the party is not entitled to a new trial on the ground that the evidence does not correspond with the declaration, if the declaration could by amendment have been made to clearly cover the evidence; and certainly, if the jury could consider the evidence, the court was authorized to charge upon it as a part of the case. S., F. & W. Railway Co. v. Barber, 71 Ga. 644 (2), 648; Howard v. Barrett, 52 Ga. 15; Ga. R. Co. v. Lawrence, 74 Ga. 534; Ocean S. Co. v. Williams, 69 Ga. 251 (4a), 261; Haiman v. Moses, 39 Ga. 708; Pomeroy, Rem. & Remed. Rights, § 554, *et seq.* And see Central R. Co. v. Hubbard, 86 Ga. 627, and cases cited. * * *

[1] HADLEY, J., in Schwaniger v. McNeeley, 44 Wash. 447: "When evidence is received without objection upon any particular ground not covered by the complaint, the court may assume that the complaint is as broad as the evidence when charging the jury, and the complaint will be deemed amended to conform with the evidence and charge, since the amendment could have been made as of course at the trial. Gallamore v. Olympia, 34 Wash. 379, 75 Pac. 978; Iverson v. McDonnell, 36 Wash. 73, 78 Pac. 202."

An amendment, however, might entitle the adverse party to a continuance, see *ante*, p. 219, Corell v. Marks.

FLANDERS v. COTTRELL.

36 Wisconsin, 564. [*1875.*]

LYON, J. 1. A question raised on the complaint will first be disposed of. It is averred therein that Mr. Noonan sold the press to Cameron, Amberg & Co. for the defendants and at their request, and no other or different cause of action is stated. The averment is entirely unproved. The question litigated on the trial was, not whether Noonan sold the press, but whether he was instrumental in enabling the defendants to sell it. This question was sharply litigated; much testimony in respect to it was given by both parties; and it was submitted to the jury as the controlling question of fact in the case. All this was done without objection by either party. Indeed the question was thus submitted at the request of the defendants.

Under these circumstances, it is too well settled to admit of doubt or controversy, that the pleadings may at any time be amended to conform with the issue really tried, or the variance may be wholly disregarded.[1]

COSTLY v. McGOWAN.

174 Illinois, 76. [*1898.*]

Mr. Justice WILKIN. * * * Numerous errors are assigned upon the record, but the only ground of reversal insisted upon is, that the court below erred in giving certain instructions to the jury on behalf of the defendants. Those objected to are the first, eighth and seventeenth of the series given at the instance of the proponents. The objection urged against them is, that they limit the inquiry before the jury to the question of the mental capacity of the testator to make the will, ignoring entirely the issue,—undue influence. The first instruction tells the jury "the question to be passed upon by the jury is this: Was the mind and memory of the deceased, at the time of making the alleged will, sufficiently sound to enable him to know and under-

[1] Accord: Hilts v. Ry., 101 Mo. 36.

stand the business in which he was engaged at the time he executed the will." The eighth instruction states what is necessary, under the law, to constitute testamentary capacity, and says: "If the jury believe, from the evidence, that when Samuel B. McGowan made the will in question he was able to remember who were the natural objects of his bounty, recall to his mind his property and make disposition of it understandingly, according to some plan or purpose formed in his mind, he had testamentary capacity, and the jury will find that the will in question is the will of Samuel B. McGowan." The seventeenth states that the law presumes testamentary capacity until the contrary is shown, and if the proof only makes the case doubtful as to whether the testator had such capacity, "then the general presumption in favor of sanity must prevail, and the jury will find that the will offered in evidence is the will of Samuel B. McGowan."

That these instructions, tested by the issue made by the bill and answer and submitted to the jury, are erroneous, admits of no question. Two issues were thus formed and made up to be tried, while the instructions,—especially the last two,—inform the jury that if they find one of those issues for the defendants they should return a verdict that the paper purporting to be the will of Samuel B. McGowan is his will. Nothing is better settled than that an instruction which ignores a material issue in a cause which is submitted to a jury for its finding is erroneous. It is true that every issue made by the pleadings is not necessarily submitted to the jury. The parties may always abandon an issue made by the pleadings, on the trial; and in this case, if it appear that the complainants below offered no evidence to support the allegation of undue influence, it would not have been error for the court, in its instructions to the jury, to ignore that issue. The plaintiffs in error have seen proper to bring the case to this court without preserving the evidence in the record, and it is insisted on behalf of defendants in error that it is therefore impossible for us to determine that the giving of these instructions was reversible error. It is stated in the bill of exceptions that "the trial of this cause consumed a period of about nine days, where the evidence was contrary and conflicting, and that the court having submitted to the jury, as issues of fact, whether or not the testator, at the time of the execution of the will in question, possessed sufficient testamentary capacity

to execute said will; second, whether or not said will was the result of undue and improper influence on the part of any of the defendants therein; and the complainants, to maintain the issues on their part, offered evidence tending to show that the testator, at the time of the execution of the said will, was not possessed of sufficient testamentary capacity to execute a valid will; secondly, evidence tending to show undue and improper influence on the part of the defendant. Proponents of the will offered evidence tending to show that the testator was possessed of sufficient testamentary capacity, and also evidence tending to show that the said will was not the result of undue and improper influence, whereupon, at the close of the evidence, the court gave the jury, on behalf of the proponents of the will, the following instructions." This is sufficient to bring before us for review the assignment of error upon the giving or refusing instructions. Illinois Central Railroad Co. v. O'Keefe, 154 Ill. 508. * * *

Judgment reversed.[1]

SCHROEDER v. MICHEL.

98 Missouri, 43. [*1888.*]

PER CURIAM. * * * The first point made is that the first instruction for plaintiff, above quoted, is erroneous because it omits from view the defense of limitation. It is undoubtedly a better and more logical practice for every instruction assuming to state the facts necessary to a verdict for plaintiff to refer to such affirmative defenses as the case may present. But whether or not the omission to do so constitutes reversible error will greatly depend on the language of the different instructions in each particular case. If the qualification of the instruction complained of appears elsewhere in a form fairly bringing it to the attention of the jury as a modification of the other, the judgment will not, on that account, be reversed. In the present in-

[1] And so where the instruction narrowed the issue to a part of the negligent acts charged, McDermott v. Ry., 87 Mo. 285. For the same reason, it is error to give an instruction which excludes a defense, Faust v. Horsford, 119 Ia. 97; Terry v. Shively, 64 Ind. 106; Ill. Lumber Co. v. Hanly, 214 Ill. 243; Scanlon v. Gulick, 199 Mo. 449.

stance, the instruction number one for plaintiff says nothing of the statute of limitations, but the bearing of instruction number six for defendant as a qualification of it is very plain: "Even if the jury believe, from the evidence, that defendant promised to marry plaintiff, yet, if you further believe that at a period of time," etc. This language could leave no doubt that if the facts named in number six were found, the plaintiff could not recover even if the facts named in number one were also believed to exist. This objection, therefore, is not sustained. * * *

IMHOFF v. C. & M. RY. CO.

20 Wisconsin, 344. [*1866.*]

Appeal from the Circuit Court for Milwaukee county.

The plaintiff was a passenger on the defendant's road from Chicago to Milwaukee; and it is alleged in the complaint that while getting off the cars, after their arrival at the latter place (which was about one o'clock at night), she, through defendant's negligence, was thrown down by the motion of the train, which had commenced backing, and received severe personal injuries; to recover damages for which this action was brought.

The answer denies these allegations. A considerable amount of evidence was introduced by both parties as to the length of time which elapsed after the arrival of the train before it commenced backing, and as to whether the usual signals were given. The defendant's evidence tended to show that the train did not commence backing until at least twenty-five minutes after its arrival. * * *

DOWNER, J. At the trial, the following instructions given to the jury at the request of the respondent's counsel were excepted to by the appellant: * * * 2. If the jury find from the evidence, that ordinary and reasonable care and attention to the safety of the passengers on the train arriving in Milwaukee at one o'clock in the morning, required that, before backing up the train and putting it away, the company should see to it by examination of the passenger cars, that the passengers were all out, and that this was not done on the night when the plaintiff was injured, then the defendant was guilty of negligence; and

if the injury to the plaintiff was occasioned by backing the train without such examination and care, the defendant is liable, unless the jury should also find that the plaintiff also was guilty of negligence, which contributed to produce the injury."

Each of these instructions assumes that at the time of the accident the contract of common carrier between the plaintiff and defendant was in force. Whether it was or not, was a severely contested piont. It is error for the court to assume a fact which the jury ought to determine.[1] It is true, the court afterwards, when asked by the defendant's counsel, instructed the jury, "That if the jury believe from the evidence that the train had arrived at the end of the route, and that a reasonable time had elapsed for the plaintiff to get out of the cars, after their arrival, before the injury to the plaintiff occurred, then the relation of common carrier between the parties had ceased, and the defendant cannot be held liable for the injury as a common carrier of passengers." The giving of this instruction did not cure the error in the others. Where erroneous instructions are given for one party, the error is not corrected by giving for the other party instructions explanatory inconsistent with, or contradictory to, those first given. The erroneous instructions should be withdrawn from the jury. Jones v. Talbot, 4 Mo. 279; Hickman v. Griffin, 6 Mo. 37; Clay v. Miller, 3 Mon. 146. There may be an exception to this rule, where it is clear to the court that the erroneous instruction did not mislead the jury.

[1] In Ry v. Shelton, 66 Ill. 424, the following instruction was held to involve the assumption that the plaintiff was thrown off while the train was in motion, etc., viz.:

"The jury are instructed, that if they believe, from the evidence, that the plaintiff had not paid or offered to pay his fare from Elkart to South Bend, then the defendant would not be warranted in throwing the plaintiff from the train, in a way to endanger his life or limb, or throw him off when the train was in motion."

GANNT, J., in Henderson v. Kansas City, 177 Mo. 477: "The defendant's criticism of this instruction is that it assumes the facts upon which it is based. As to the rapidly revolving flywheel and crank disc, it is only necessary to state that defendant's own witness, Dr. Norberg, testified to those facts as well as plaintiff's witnesses, and the defense in part was predicated on the obvious danger which they presented to plaintiff and his recklessness in placing his hand in the machinery while thus revolving. These were conceded conditions by all parties to the suit, and it was not error to speak of them as established. There was no assumption that the floor was dangerous."

But in this case, the erroneous instructions being given, the jury might have considered the first, and if they found those facts on the finding of which they were told by that instruction the plaintiff was entitled to recover, they might well have concluded they were not bound to examine further, except as to the amount of damages. The same may be said of the second instruction given; for each professes to give all the facts necessary for the jury to find to entitle the plaintiff to recover. And all such facts should be stated in every hypothetical instruction, which disposes of the entire case in favor of one party or the other. For the error in such instruction is not ordinarily corrected by giving other instructions based upon the omitted facts. According to the instructions in this case, if the jury had found the facts set out in either of the plaintiff's instructions they must find for him; and if they found the facts stated in the instruction given at the request of the defendant, they must find for him. They might have found from the evidence the facts mentioned in all three of the instructions. It is obvious the two first instructions tended to mislead the jury, and to divert their attention from some of the facts on which their verdict ought to rest. And for this reason the judgment of the Circuit Court must be reversed. * * *

WOMACK v. INTERNATIONAL &c. R. R. CO.

100 Texas, 453. [*1907.*]

BROWN, Associate Justice. * * * At the request of the defendant, the court below gave to the jury the following special charge: "If from the evidence you believe that at and immediately prior to the fire in the hay barn, the switch engine, which it is claimed set fire to said barn, was equipped with spark-arresting apparatus of the best and most approved kind, and such as is generally used by well regulated railroads, and further believe from the evidence that the engine was properly and carefully handled by the men in charge thereof, then you will return a verdict for the defendant, even if you should further believe from the evidence that the fire was started by a spark of fire emitted from or thrown by the engine."

And in its general charge, the court instructed the jury as follows:

"II. If you believe from a preponderance of the evidence that the fire which destroyed the property described in plaintiffs' petition, was directly and proximately caused and occasioned by sparks emitted from one of defendant's switch engines, as alleged in plaintiffs' petition, you will return a verdict for plaintiffs, unless you further believe from the evidence that defendant exercised ordinary care on said occasion, to have said engine provided with one of the best and most approved kind of appliances in use by railway companies for preventing the escape of fire from railway engines; that defendant exercised ordinary care to see that said appliances, if there were such, were in reasonably good repair and condition on said occasion to prevent the escape of fire from said engine, and that said engine was on said occasion handled with ordinary care and skill to prevent the escape of fire, or unless you find in defendant's favor on the issue of contributory negligence, hereinafter submitted to you."

Plaintiffs in error have assigned error upon the action of the court below in giving to the jury said requested special charge, upon the ground that it withdrew from the consideration of the jury the question of the defective condition of the spark-arresting apparatus on defendant in error's engine, and that it was in conflict with the paragraph of the court's general charge above quoted. * * *

In conformity with the decision of this court in Scott v. Texas & Pacific Railway Company, 93 Texas, 625, the trial court submitted the plaintiffs' case in its main charge, in substance, stating to the jury that if the fire which destroyed plaintiffs' property was proximately caused by sparks from the defendant's engine, they should find for the plaintiffs, unless the evidence showed that the railway company had exercised ordinary care and diligence in the particulars specified in that charge. The defendant by the special charge sought to have its view of the case submitted and practically presented the same propositions as those contained in the general charge, except that in the special charge it is not definitely stated that to defeat plaintiffs' case the evidence must show that the defendant had exercised ordinary care to keep its engine and spark-arrester in reasonably safe condition. The special charge when given became a part of the charge of the court to the jury and in construing the special charge we must look to the main charge upon the same points just as if both paragraphs had been embraced in the court's

original charge. There is no conflict between the two paragraphs. In considering the two charges together the jury would not understand that the court intended to tell them in one paragraph that the railway company would be liable if the evidence did not show that it had used ordinary care to keep its spark-arrester in reasonably safe condition, and in another paragraph the court intended to tell them that the plaintiffs could not recover, although the evidence did not show that the railway company used ordinary care to keep its spark-arrester in safe condition. To reach such a conclusion would require more ingenuity than the juror brings to the impartial discharge of his duties. The giving of the special charge did not have the effect to withdraw from the jury any part of the main charge, and the whole charge being before them, they would not disregard an affirmative requirement because it was omitted from the negative phase of the instruction, but would naturally construe both charges to mean the same thing.

HARRINGTON v. PRIEST.

104 Wisconsin, 362. [*1899.*]

The plaintiff brought this action to recover for dental services rendered to the defendant, alleged to have been of the reasonable value of $250. The defendant answered that such services were so improperly, unskillfully, and negligently performed as to be worthless, and in his counterclaim alleged that by reason of such negligent and unskillful work he was damaged in the amount of $1000. The jury returned a verdict for the plaintiff for $228.30. A motion for a new trial was denied, and from the judgment entered upon the verdict the defendant appeals.

BARDEEN, J. The complaint alleges that the plaintiff performed certain dental services for the defendant, which were reasonably worth $250. The answer denies that such services were worth that amount, and alleges that they were so negligently and unskillfully performed as to be entirely worthless. Here was presented a plain and simple issue. The burden of proving that the services rendered were performed with reasonable skill, and were worth the sum mentioned, was upon the plaintiff. Upon this point the court charged the jury as follows: "The

burden of proof, so far as this case is concerned, rests upon the plaintiff to establish his side by a fair preponderance of the evidence, which is sometimes called the down weight of the evidence. If you find from the testimony, as I say, that the plaintiff did this work in a reasonably careful and skillful manner,—in such manner as dentists of ordinary standing or good standing in this community or this vicinity would have done it,—and that the price he has charged is a reasonable price, then you should return a verdict in favor of the plaintiff for the full amount claimed." This was a proper charge under the issues so far presented. But the defendant set up a counterclaim in which he alleged that he had been damaged in the sum of $1000 by reason of plaintiff's unskillful and negligent work. The defendant thus assumed an aggressive attitude, and presented an affirmative issue. In order to recover upon his counterclaim, the burden was clearly upon him to show that he had been damaged by reason of the plaintiff's negligent and unskilful work. The trial court, however, seems to have failed to grasp the situation. Immediately following the charge quoted, he makes the following statement to the jury: "If, on the other hand, you find from the evidence, and there the burden of proof rests upon the defendant in establishing the fact that the work was improperly done, it is necessary for the defendant to satisfy you of that by a fair preponderance of the evidence; as I say, on that branch of the case the burden of proof rests upon the defendant. So that if you are satisfied from the evidence, by a fair preponderance of the evidence, that the plaintiff did the work in an unskilful and negligent manner, and did it in such a way as it would not have been done by a dental practitioner in good standing in this vicinity, and the work was not as good as it should have been under that rule, then it will be your duty to determine the amount of difference caused by such unskilfulness and negligence or want of care."

This must have left the jury in the utmost confusion.[1] In the

[1] GRAY, C. J., in Mooar v. Harvey, 125 Mass. 574: "Although a judge is not bound to receive a request for instructions after he has concluded his charge to the jury, yet, if he does give further instructions, they are a subject of exceptions. The defendant's intention was a fact in controversy at the trial, and was in law a material element in determining whether he resided out of the commonwealth, within the meaning of the statute of limitations. Gen. Sts. c. 155, § 9.

one place he tells them, in effect, that the burden is upon the plaintiff to show that he performed the services sued for in a reasonably skilful and careful manner, and that they were reasonably worth the sum charged therefor. These matters were directly put in issue by the defensive allegations of the answer. Confessedly, the plaintiff had the laboring oar, and, if the evidence of the defendant was of equal weight with that of plaintiff, the latter could not recover. There was no burden upon defendant to show affirmatively that such services were negligently or unskilfully performed, or that they were not worth the sum claimed. If his evidence in defense left the issue in doubt or uncertainty, the plaintiff could not recover. But in the next breath the court tells the jury that the burden rests upon the defendant "in establishing the fact that the work was improperly done." Under the circumstances this certainly could not be true. The inconsistency of the two statements is too apparent to require argument. When it came to the question of damages under the counterclaim, the defendant could not secure a recovery except that he established a claim therefor by the preponderance of the evidence. The court failed to properly distinguish between the two issues presented, and the jury were left to wander in the realms of doubt and speculation. This was distinct error, for which the judgment must be reversed. The errors alleged as to the improper admission of testimony are too unsubstantial to require comment.

By the Court.—The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

Langdon v. Doud, 6 Allen, 423, and 10 Allen, 433. Hallet v. Bassett, 100 Mass. 167. Perkins v. Davis, 109 Mass. 239. The instructions given, informing the jury, in one breath, that if the defendant resided out of the commonwealth his intention was immaterial, and, in the next, that if the jury were in doubt as to his residence they might consider his intention as matter of evidence, were contradictory and insufficient, and tended to confuse, if not to mislead the jury; and having been specifically excepted to, the exceptions must be sustained.

See also Frederick v. Allgaier, 88 Mo. 598; Norton v. Paxton, 110 Mo. 456.

BRUSSEAU v. LOWER BRICK CO.

133 Iowa, 245. [*1907.*]

Action for damages caused by the breaking of an elevator cable. Judgment was entered for plaintiff. The defendant appeals. Affirmed.

LADD, J. The plaintiff was an employee of the defendant, and at the instance of its foreman was engaged in removing building blocks from the upper floors of its building. He had placed about one hundred and twenty of these blocks on a car and run it on the freight elevator. As this was descending, the cable broke, precipitating him, with the load, to the bottom, and seriously injuring him. Several errors are complained of as having occurred in the trial. * * *

IV. But two questions requiring attention remain, and these are whether the issues of assumption of risk by plaintiff and negligence of defendant were properly submitted to the jury. The answer set up that plaintiff had assumed the risk of the cable being defective, and the court submitted that issue to the jury in the ninth instruction. But in instruction No. 4½ the jury was told that, if the defendant was negligent and the injury resulted therefrom without fault on plaintiff's part, he was entitled to recover, unless they found that there had been a settlement. Manifestly these instructions were contradictory in saying that recovery might be had regardless of any assumption of risk, and that if plaintiff had assumed the risk he could not recover. Quinn v. Railway, 107 Iowa, 710; Meyer v. Boepple Button Co., 112 Iowa, 51; Christy v. City Ry. Company, 126 Iowa, 428. An instruction similar to No. 4½ was held to have been without prejudice in Stomme v. Hanford Produce Company, 108 Iowa, 137, owing to the manner of submitting all the issues later on in the instructions, and in Wilder v. Great Western Cereal Co., 130 Iowa, 263, prejudice was obviated by the fact that the issues were such that a finding of the company's negligence necessarily negatived any assumption of risk by the party injured. The instructions in the case at bar are necessarily conflicting, and therefore erroneous, but were not prejudicial, for the reason that the record is void of any evidence tending to show that plaintiff had knowledge of the condition of the cable or appreciated the danger involved in operating the elevator with

it. The mere fact that he had opportunity of ascertaining its condition by investigation, while assisting another in repairing the machinery connected therewith without exposing the cable to view, when inspecting it was no part of his duty, did not charge him with knowledge, and he must have appreciated the danger in order to have assumed the risk. There was no evidence upon which to submit the issue, and in doing so the instructions were more favorable to appellants than they were entitled to have them. * * *

EGGETT v. ALLEN.

106 Wisconsin, 633. [*1900.*]

BARDEEN, J. * * * The issue sharply outlined by the pleadings was whether the defendant did in fact authorize or institute the proceedings against the plaintiff. The usual defenses of want of malice, probable cause, or advice of counsel were not interposed. No attempt was made to justify the commencement of the prosecutions. True, the defendant testified that he consulted G. I. Follett, an attorney, in regard to a claim he had against the plaintiff; but he nowhere discloses what advice, if any, was given as to the prosecutions in question. Notwithstanding the entire absence of any testimony in the case on this subject, the court submitted it to the jury upon the assumption that the defendant was urging the advice of his attorney as a justification for having authorized or instituted the prosecution against plaintiff. He told the jury that if a party fully and fairly stated all of the material facts of the case to his attorney, and was by him advised that he had good grounds to proceed in a criminal prosecution, and he acted in good faith upon such advice, he was protected from an action for malicious prosecution. Then, again, he said to them: "How was he advised by the attorney? Did he fully and fairly state all the material facts to his attorney?" etc. It is claimed that this introduced a foreign issue into the case, and that the prominence given it by the trial judge had a tendency to obscure or minimize the real issue, and was harmful to defendant.[1] There seems to be good ground for

[1] GANTT, J., in Mateer v. Ry., 105 Mo. 320: "The evidence contains not one scintilla of fraud on the part of Jones, Dickinson or the defendant. There is not in it, from beginning to end, one word that justi-

this contention. The court assumed facts to exist which did not exist. The authorities are that it is clearly error to charge a jury upon a supposed or assumed state of facts, of which no evidence has been offered.[2] Such instructions presuppose that there is some evidence before the jury which they may think sufficient to establish the facts thus assumed in the opinion of the court; and, if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. 2 Thomp. Trials, §§ 2295-2315; U. S. v. Breitling, 20 How. 252; Michigan Bank v. Eldred, 9 Wall. 544; Baltimore v. Poultney, 25 Md. 18. The issue of justification under advice of counsel was not in the case, and it was wrong to assume that it was, and thus distract the attention of the jury from the real issue presented. * * *

fied the trial court in submitting the issue of fraud to a jury. There is nothing in it tending in the remotest degree to impeach the absolute fairness of Jones, the claim agent, or Dickinson, the superintendent. There is nothing on which to base the seventh instruction. It was error to submit the question to the jury at all, and greater error to give the seventh instruction. That instruction, besides having no evidence to support it, was clearly erroneous in permitting the jury to disregard the release, if defendant's claim agent procured it by 'any trick or artifice.'

"This instruction well illustrates the vicious pleading which had stated no substantive fact upon which to hinge the charge of fraud. Of course, as no fraud was specified, when the court came to instruct, it could not, as required by all correct practice, confine plaintiff to the tricks or artifices charged in the petition, but 'the jury were given a roving commission' to scent out and find some artifice or trick, whether in the case or not. Such a practice cannot be tolerated."

[2] ALDERSON, B., in Stracy v. Blake, 1 M. & W. 168: "I agree that we are not to take an admission in one plea as evidence on another. But if the parties have a particular controversy, and it seems plain that a certain fact is admitted between them in the course of that controversy, may not the jury, as men of common sense, draw the same conclusion as to that fact as if it were formally proved before them? I think they may, and that they are at liberty to draw it as to all the questions in issue in the cause."

MANNING v. WEST END STREET RAILWAY CO.

166 Massachusetts, 230. [*1896.*]

Tort, for personal injuries occasioned to the plaintiff by being struck by a switch-stick which flew from the hands of a conductor in the employ of the defendant corporation, as he was using it on top of an electric street car to free the trolley, which had caught in a frog at the junction of some overhead wires in a street in Boston. At the trial in the Superior Court, before BISHOP, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

HOLMES, J. * * * Next it is said that there was no evidence of negligence on the part of the defendant. The conductor must be taken to have known that he was in a public street in which there were or might be travelers, and therefore must be taken to have known that, if the stick did fly with violence from his hands, there was a danger to passers similar, although less in degree, to that which would have attended the firing of a pistol into the way. Apart from the possibility that he might receive an electric shock sufficient to make him let go his hold, the jury were at liberty to say, from their experience [1] as men of the world, that under such circumstances such an accident commonly does not happen unless the stick is carelessly handled; that it is in the power of the holder to see that he does not submit it to such a strain as to make it possible that it should be torn from his hands; and to infer from those general propositions of experience that there was a negligence in the particular case. See Graham v. Badger, 164 Mass. 42, 47; Uggla v. West End Street Railway, 160 Mass. 351; White v. Boston & Albany Railroad, 144 Mass. 404. * * *

BAKER v. SUMMERS.

201 Illinois, 52. [*1903.*]

Mr. Justice CARTWRIGHT delivered the opinion of the court: * * *

[1] For other instances in which a jury may act on general knowledge, see Wigmore on Ev., § 2570.

The first instruction given at the request of plaintiff was an abstract proposition of law, stating the liability created by the Dram-shop act, and the right of action thereby given, substantially in the words of the statute, stating the liability to be "for all the damage sustained, and in this case not exceeding the sum of $5000." The instruction contained no other reference to the case and no reference to the evidence, and did not require proof of facts which would create a liability. The instruction was erroneous in substantially telling the jury that the defendants were liable for the damages sustained, not exceeding the sum of $5000, without proof of the necessary facts, and merely because the statute provided for a liability.[1]

The second instruction told the jury that they should find the issues for the plaintiff if she had established, by a preponderance of the evidence, the material allegations of any of the counts in the amended declaration. There was no instruction telling the jury what the material allegations of the several counts were, and what were the material allegations was a matter of law for the court. Although it is a practice not to be commended for the court to refer the jury to the declaration for the issues, it has not been considered error to make such reference where the instruction requires proof of the averments of the declaration.[2] The proper method is for the court to inform the jury, by the

[1] SHAW, C. J., in Commonwealth v. Porter, 10 Metcalf, 263: "That course is, for the judge to direct the jury hypothetically, to declare what the law is, with its exceptions and qualifications, to explain it, and to state the reasons and grounds of it, if, in his judgment, such explanation is necessary to make it clearly intelligible to the minds of men of good judgment and common experience, but without legal knowledge and skill; then to state to the jury, that if certain facts necessary to constitute the offense, and which there is evidence tending to prove, are proved to their satisfaction, they are to find the defendant guilty; but if certain material facts, which there is some evidence tending to prove, are not proved to their satisfaction, they are to find the defendant not guilty."

BRACE, J., in Fisher v. Lead Co., 156 Mo. 479: "This case furnishes an apt illustration of the futility of endeavoring to apply abstract propositions of law to a case they do not fit. For the error noted, and to the end that a jury in another trial may be told, not what the law of the case is—it is sufficient if the court understands that—but clearly what they must do, by way of a verdict, on the facts in the case really in issue, as they may find them, the judgment of the Circuit Court is reversed and the cause remanded for new trial."

[2] GANTT, P. J., in State v. David, 131 Mo. 380: "Again, it is urged against this instruction that it re-

instructions, in a clear and concise manner, as to what material facts must be found to authorize a recovery. The averments in the declaration which would be clear to a lawyer would often be obscure and unintelligible to the average juryman. (Moshier v. Kitchell, 87 Ill. 18.) Where the jury are not only referred to the declaration to determine the issues, but are instructed to find a verdict for the plaintiff if the material allegations of the declaration are proved, they are left to decide, as a matter of law, what are the material allegations, and might conclude that some allegation essential and material in the law was not material or necessary to be proved to justify a recovery; and such an instruction as this was held to be undoubtedly erroneous in Toledo, St. Louis and Kansas City Railroad Co. v. Bailey, 145 Ill. 159. * * *

SWANSON v. ALLEN.

108 Iowa, 419. [*1899.*]

On the 22d day of June, 1896, the plaintiff executed a written order to the Aultman Company, of Ohio, to deliver to him a complete threshing outfit through its agent, R. H. Allen, at Early, Iowa, accompanied by a specific written warranty. * * * The petition alleged in the first two counts the purchase of the outfit of the defendant on his oral warranty that it was of good material, and would do as good work and as much work in all

ferred the jury to the indictment to find the issues they were to pass upon. As was said in this court in State v. Scott, 109 Mo. 226, 'the jury should not be referred to the pleadings in civil, or the indictment in criminal, cases to ascertain the issue.' But mere reference to the indictment by the words 'as charged in the indictment' or 'as mentioned in the indictment,' after the court has once clearly defined the issues, does not constitute error.

"In this case the court had fully defined the essentials of the crime charged, which was simply that defendant had murdered Henderson, the deceased, by administering to him strychnine. The mere reference by the court and counsel for the State in these instructions to 'the crime charged in the indictment' could not have been prejudicial. Counsel for defendant uses the same phraseology in his own instruction in the same connection. Britton v. St. Louis, 120 Mo. 437; Edelmann v. Transfer Co., 3 Mo. App. 503; Corrister v. Railroad, 25 Mo. App. 619. * * *"

kinds of grain as any other of like size and capacity, and a breach thereof. In count 1 the plaintiff prayed for damages, but in count 2, in addition, averred the tender of the return of the outfit, and asked judgment for the value of the property paid, and the cancellation of the notes executed. Count 3 was like count 1, save that it alleged the personal warranty mentioned as an inducement to take the outfit, even though the property was bought of the company. The answer consisted of a general denial, and an averment that the sale was by a written order, and that the property was accepted by the plaintiff thereunder; and, in the counterclaim, recovery was claimed on three notes matured because of the nonpayment of interest. Trial to jury, verdict and judgment for the plaintiff, and the defendant appealed.

LADD, J. Nothing is of greater importance in a jury trial than that the court shall make clear and certain to the jurors the very issues they are to determine. Ordinarily those required to serve are unaccustomed to the duties devolving upon them, and are likely to become confused by the mass of conflicting evidence and the illimitable arguments of counsel. The very purpose of instructing them is to make plain the issues they are to try, and the rules of law by which the evidence is to be examined and applied. Pleasants v. Fant, 22 Wall, 116; Duthie v. Town of Washburn, 87 Wis. 231 (58 N. W. Rep. 381). They should not be required to search the pleadings, even though copied into the instructions, for the controverted facts to be passed upon. It is often difficult for the experienced lawyer to fix upon the precise contentions of the parties, and there can never be any degree of certainty that jurors, without legal training, have been able to do so from an examination of the pleadings; besides, it is as much the duty of the judge to extract the issues from the pleadings, and make them known and intelligible to the jurors, as it is their duty to pass upon them when this has been done. The practice of referring the jury to the pleadings has been condemned by this court. Porter v. Knight, 63 Iowa, 367; Keatley v. Railway Co., 94 Iowa, 688; Bryan v. Railway Co., 63 Iowa, 464. Also that of reading them as part of the charge. Hall v. Carter, 74 Iowa, 366. Copying the pleadings into the instructions as a statement of the issues is subject to the same criticism as the use of the originals, if the jury are permitted to take these upon retirement for deliberation. The only difference lies in their attachment as a preface to the other portion of the charge,

and the use of the original separately. In Gorman v. Railway Co., 78 Iowa, 518, so copying was disapproved, and in Robinson & Co. v. Berkey, 100 Iowa, 136, it was held erroneous. In Hollis v. Insurance Co., 65 Iowa, 460, the issues were subsequently stated, the copies being treated as surplusage. In Little v. McGuire, 43 Iowa, 447; and Crawford v. Nolan, 72 Iowa, 673, it was held that, in view of the plain and unambiguous language of the pleadings, and the simplicity of the issues, stating them in the words of the pleader was without prejudice. The rule, then, deducible from these authorities is that the court must determine from an examination of the pleadings what the issues are, and so state them to the jury as to be readily comprehended, and that setting out the pleadings in lieu thereof will not be tolerated, unless manifestly without prejudice. We may add that such issues cannot be too clearly and explicitly stated, and that terseness and brevity will uniformly add emphasis.

In the case at bar, the pleadings, except an amendment and general denials, were copied as a statement of the issues, covering nine closely printed pages of the abstract, and constituted the first eleven instructions. As the petition was in three counts, and the counterclaim contained a like number, this involved unnecessary repetition, tending to confusion, and to the obscurity of the real differences between the several issues in controversy. They should have been made plain and accessible to the jury, in language comprehensible to those unlearned in the law, and free from vain repetition. * * *

Judgment reversed.

GURLEY v. MO. PAC. RY. CO.

93 Missouri, 445. [*1887.*]

BLACK, J. Plaintiff recovered a judgment against the defendant for ten thousand dollars damages for personal injuries. The grounds of the defendant's complaint are: (1) the refusal of the court to sustain a demurrer to the plaintiff's evidence; (2) the giving of plaintiff's first instruction; (3) excessive damages.

Twelve or fifteen years ago the defendant constructed a plank walk from its depot at Pleasant Hill to the Planters' House, at

that place. The walk was then intended to accommodate passengers in going to and from the dining-room at the hotel. It has, at all times since, been used by the public in going to and from the depot. Between the Planters' House and the depot, the walk crosses a side or house track, which is habitually used by the defendant for standing or storing cars. On the 22d of January, 1885, a number of cars were standing on this track, six or seven to the north, and others to the south of the crossing. They were detached at the walk so as to leave an open space of three or four feet for persons to pass through. The petition sets out the foregoing facts, and then states that, while attempting to use the crossing, and by reason of the negligence of the defendant's servants, plaintiff was, "suddenly, and in a manner hereinafter stated," caught between said cars; "that, at the time he approached said crossing as aforesaid, he attempted to pass through the opening between the cars, stationed on either hand thereof as aforesaid; that, just as he entered said opening, defendant, by its agents, servants, and employees, unskilfully, negligently, and carelessly, and with great violence, drove and forced on or against the said stationary cars, on the northeasterly end of said side track, certain loose cars, or a loose car, whereby said stationary cars were driven on and against plaintiff, and he was crushed and mangled between them and the other of said stationary cars, and received the irreparable injuries aforesaid."

The evidence shows that these cars were in the position before described during the day, and that various persons had passed between them on the walk. About seven or eight o'clock in the evening, plaintiff started from the Planters' House to the depot, intending to post a letter on the mail train. He says when he got to the crossing, he stopped and looked both ways, but could see no engine or moving train. The instant he stepped between the cars those to the north suddenly moved to the south and caught him as the cars came together. He received injuries to his leg which are serious and permanent. He states that when he approached the cars they appeared to be still, that it was light, and that he saw no engine or moving train, and that the racket when hurt seemed to come from the car that hit him. The grade of the side track at and to the north of the crossing slopes southward. The evidence of the plaintiff's son, and that of some employees of the defendant, who were called by the plaintiff, tends to show that there was no engine at or about the side

track at that time or even that afternoon. The defendant asked no instructions, and offered no evidence, save that of one or two physicians as to the character of the injuries. The plaintiff's first instruction states hypothetically the foregoing facts in detail, which the evidence shows and tends to show, and concludes as follows: "That, at the time plaintiff so attempted to pass between said cars on said crossing, he was, by reason of the carelessness and negligence of the defendant's agents, servants, and employees, without any negligence or carelessness on his part contributing to the injury he received, caught between the cars so standing on said side track and so separated at said crossing, and that he thereby, and by reason thereof, received the injuries complained of in his petition, then the jury will find for the plaintiff." * * *

From the general and indefinite instructions, which were given, it would seem that the case was tried by the plaintiff and court on the theory that it was sufficient and good pleading to state generally, that plaintiff was injured by the carelessness and negligence of the defendant's agents and servants. It is clear that the pleader never thought of resting his case on such allegations; for while there is such general allegation, still, by a part and parcel of it, reference is made to the subsequent specific acts of negligence. But a petition with such a general allegation only would be worthless, and a like instruction equally faulty. In cases like the present one, where the negligence is a mixed question of fact and law, where the jury must determine whether the defendant was negligent or not in the light of the surrounding circumstances, the acts, which it is intended to be shown were negligently done, should be set out with a reasonable degree of particularity, and in some appropriate form of expression charged to have been negligently done. The defendant will then be notified of what he is charged. Issues can be made and submitted to the jury. Of course the statement of the matters of inducement, the surroundings and situation of the parties, need not be coupled with an allegation of negligence. We have recently held, where the method of pleading before indicated is pursued, the plaintiff may, under his petition, show that the defendant knew, or, by the exercise of ordinary care, would have known, that the machinery or appliances were defective and out of repair. Crane v. Railroad, 87 Mo. 591. The acts done or

omitted must, however, be stated with a reasonable degree of particularity.

So far as the instruction is concerned, it permits a recovery if the jury should find that the plaintiff was, by reason of negligence of defendant's employees, caught between the cars. Negligent in what respect? It does not say. Such a general and indefinite instruction would be bad on good pleadings. It is true the instruction requires the jury to find the existence of a great many things, but they are not required to find that there was any negligence on the part of defendant in respect of any of them.

With these results the question of excessive damages becomes immaterial. The judgment is reversed and the cause remanded. All concur.

DAVIDSON v. STANLEY.

2 Manning & Granger, 721. [*1841.*]

Assumpsit, against the defendant as the drawer, payee, and indorser of ten bills of exchange, amounting altogether to £7366 17s. 7d., drawn, and payable, at different periods in the year 1839.

The pleas denied that the bills were drawn or indorsed by the defendant.

At the trial before ROLFE, B., at the last Liverpool Assizes, the ten bills were produced, and purported to be drawn and indorsed by "Robert Blundell, by procuration of Thomas S. M. Stanley."

Blundell, the person representing himself in these instruments as the agent of the defendant, had been his understeward, but about eleven years ago, seven months after the death of the late head steward, he was promoted to the office of head steward. It was stated and admitted, that since the negotiation of the bills in question Blundell had been convicted of embezzling the moneys of his employer, and transported for fourteen years.

The bills were drawn upon and accepted by five persons, one of whom was tenant of the defendant, another his shepherd, and the other three were also servants employed by him, who had, at Blundell's request, given their acceptances to Blundell, in blank.

There was no proof of any direct authority from the defendant to Blundell, either to draw or to indorse bills for him. The circumstances under which it was contended, on the part of the plaintiff, that the jury might infer an authority, were these: (The report here sets out a number of circumstances relied on to show authority.)

The learned judge in his direction to the jury, told them, that in order to make out that a party is drawer and indorser by the agency of another, it is not necessary to have a written authority, but that it is of the greatest importance that there should be very clear evidence that the agent has authority for what he does with regard to bills: that ordinarily speaking persons receiving such bills would require distinct written or verbal authority, in order that there might be no difficulty afterwards: that a party who transacts business with one who acts in the name of another may always render himself secure by refusing to advance money without distinct proof of the alleged authority; that the authority, however, might be circumstantial only, as where the principal profited by the transaction, or trusted to the agent for reimbursement, or where, though he derived no advantage from the transaction, he acquiesced in it, but that in such cases the evidence should be extremely clear; that although the defendant's bankers might have had reason to suppose that Blundell was using the defendant's name with his authority, that was not equivalent to notice to the defendant himself and that the defendant was not bound by anything of which the bankers may have had notice, or which by inquiry they might have fished out. The learned baron went minutely through the evidence, and observed upon the absence of McDonald and the non-production of the pass-book with the Commercial Bank. The jury, which was a special one, consulted together for a few minutes, and then returned a verdict for the defendant.

Stephen, Serjt., now moved for a new trial on the ground of misdirection. * * *

TINDAL, C. J. I am of opinion that no ground has been shown for this motion. I do not perceive that any proposition of law was laid down by the learned judge which was not strictly correct. The whole objection amounts to this,—that the opinion of the judge was delivered in favor of the defendant. I think it is no objection that a judge lets the jury know the impression which the evidence has made upon his own mind. At all events,

the party objecting to such a course should show that the impression entertained by the judge was not justified by the evidence. If bankers could recover upon such a state of facts as was presented to the jury in this case, every farm agent might pledge the credit of his employer to an indefinite amount. Here, there was no direct authority; and the case of Murray v. The East India Company, establishes that a general authority to receive and pay, does not authorize the agent to indorse bills of exchange. Here, it was never shown that the defendant knew, or had the means of knowing, that his name was used in the manner in which it was used by Blundell.

BOSANQUET, J. I am quite of the same opinion. I think the verdict was perfectly right. The learned judge considered that there was some slight evidence of authority, and that he would not be justified in taking the case upon himself. It seems to me that if a nonsuit had been directed, there must have been a new trial. A judge has a right to state what impression the evidence has produced on his mind.

COLTMAN, J. The learned judge seems to have made strong observations; but not stronger than he was justified in making. A large mass of evidence had been given, which, though of little weight in itself, was of such a nature as might mislead a jury.

Rule refused.[1]

[1] See also Mitchell v. Harmony, 13 Howard, (U. S.) 115, approving an equally vigorous comment on the evidence.

The judge is not required to comment on the evidence or advise the jury as to matters of fact, but may do so as a matter of discretion. Lord O'Hagan in Prudential Ins. Co. v. Edmonds, L. R. 2 App. Cases, 487: "I am free to say that the expressions used by the learned judge were very strong indeed, and I am not indisposed to admit, with one of the learned judges of the Court of Appeal, that the jurors may to some extent have thought those expressions strong enough to coerce their judgment upon the question before them. But it does not at all follow from that, that we are to allow the bill of exceptions. I myself have had some practical experience as a common law judge, and I know that some judges have thought it right to balance the evidence on questions which juries have to consider on the one side and on the other, and to leave the jurors, who are constitutionally the judges of fact, to draw their own conclusions; but I am aware, also, that other judges, and I should infer from this bill of exceptions, although I know nothing of his practice otherwise, that the learned Lord Chief Baron is one of them, who think it to be their duty to direct the juries as well as they can upon questions of fact as upon questions of law; not to coerce

ALLIS v. LEONARD.

58 New York, 288. [*1874.*]

Appeal by defendants Stevens and Hathaway from judgment of the General Term of the Supreme Court in the third judicial department, affirming, as to them, a judgment in favor of plaintiff entered upon a verdict, and affirming an order denying a motion for a new trial.

This was an action upon a promissory note. The defense was payment. Plaintiff was called as a witness and gave testimony in his own behalf.

Defendants called two witnesses who testified, in substance, that they knew plaintiff's reputation and that it was bad.

The court charged the jury, among other things, as follows:

"You have the plaintiff's evidence, to which you are to give such credit as you think it entitled; and allow me to say, before the consideration of the evidence, that the impeachment or attempted impeachment of the plaintiff has entirely failed. It has not affected his credit, but yet the credit of the witness is always in the hands of jurors, and they are to give such credit to each one as they are entitled to. You are to look at the witness on the stand and observe the evidence he gives, and the probability of the story he relates, and the consistency of the statement he makes, and his apparent candor and frankness and his interest in the case. All these things you will take into consideration in determining his credit. You will take into consideration such evidence as tends to impeach—for instance, if his statements out of court are inconsistent with his evidence in court, it is proper for your consideration in determining the credit due him as a witness; and it is proper for you to consider the credit to be given to the plaintiff and all the different witnesses called

them, but to give expression to their own opinions in clear words, and if those expressions of their opinions in clear words do lead the jury to conclusions in accordance with the conclusions of the learned judge, the judge is the better pleased with that, and very often the jurymen are none the worse for it. Therefore, although there are very strong expressions in this charge, yet inasmuch as the reference of a matter to the judgment of the jury must very often be an understood reference and not an expressed reference, I take it that upon the whole that is no ground upon which we can set aside the verdict or maintain the bill of exceptions."

upon the stand. You are to determine who has told the truth and what the truth of this transaction is."

The defendant excepted to so much of the charge as is in the words following:

"That the impeachment or attempted impeachment of the plaintiff has entirely failed; it has not affected his credit."

CHURCH, C. J. Two witnesses gave evidence tending to show that the plaintiff's general character was bad. This evidence, though not very strong, was legitimate upon that question. The judge charged the jury, "that the impeachment, or attempted impeachment of the plaintiff, has entirely failed; it has not affected his credit," etc., which was specifically excepted to. I can see no sufficient answer to the point that this was error. The evidence was competent, and whether strong or weak, should have been submitted to the jury for their consideration, upon the credibility of the witness. Three answers have been suggested: First, that other portions of the charge neutralized the effect of this clause. It is true that the learned judge told the jury that the credibility of the witness was a question for them, but we think the fair construction of all he said about it was to instruct them that, in passing upon the credibility of the witness they must exclude from consideration the element of general bad character, sought to be proved by the two witnesses called, and the jury must have so understood it. Second, it is said that, at most, it was but an expression of opinion or commentary upon the facts which is not the subject of a legal exception. This is not tenable. It was more than an opinion or commentary; it was a decision or instruction that the evidence adduced was not sufficient to be considered by them, that it was a failure, and did not affect the credit of the witness. This was an instruction in the form and substance of law. There are cases holding that a mere opinion or commentary upon the facts is not the subject of an exception, but in such cases, it is held that the judge must accompany such commentary with explicit instructions that it is the duty of the jury, notwithstanding, to consider the evidence and decide as they think the truth requires.[1] (19 Wend. 186; 42 Barb. 326). To be free from legal objection it must be ad-

[1] MR. JUSTICE SWAYNE in Nudd v. Burrows, 91 U. S. 426: "It appears by the bill of exceptions, that, in charging the jury, the judge commented upon the evidence. Questions of law are to be de-

visory merely, and must not be put in the form of a direction as matter of law. (21 Wend. 509-525.) The jury is the constitutional tribunal for the determination of questions of fact; and I am persuaded that justice is better administered when courts refrain altogether from any interference with its rightful province. Jurors cannot distinguish between a direction in a matter of law or fact. They are bound to take the law from the court; and a positive direction from the bench, as to a question of fact, is as potent as if it pertained to a question of law; and even an expression of opinion calculated to influence the decision of the jury in a matter clearly within their cognizance, should be critically scrutinized. In this case the direction was unqualified as we construe the charge.[2] Third, it is claimed that the exception is not available, because no request was made to submit the question to the jury. The rule invoked does not apply. There was no necessity for a request; the court had made a dis-

termined by the court; questions of fact, by the jury. The authority of the jury as to the latter is as absolute as the authority of the court with respect to the former.

No question of fact must be withdrawn from the determination of those whose function it is to decide such issues.

The line which separates the two provinces must not be overlooked by the court. Care must be taken that the jury is not misled into the belief that they are alike bound by the views expressed upon the evidence and the instructions given as to the law. They must distinctly understand that what is said as to the facts is only advisory, and in no wise intended to fetter the exercise finally of their own independent judgment. Within these limitations, it is the right and duty of the court to aid them by recalling the testimony to their recollection, by collating its details, by suggesting grounds of preference where there is contradiction, by directing their attention to the most important facts, by eliminating the true points of inquiry, by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and their combined effect, stripped of every consideration which might otherwise mislead or confuse them. How this duty shall be performed depends in every case upon the discretion of the judge. There is none more important resting upon those who preside at jury-trials. Constituted as juries are, it is frequently impossible for them to discharge their function wisely and well without this aid. In such cases, chance, mistake, or caprice, may determine the result.

We do not think the remarks and suggestions of the learned judge in this case exceeded the proper license."

[2] And so in M'Lanahan v. Ins. Co., 1 Pet. 170, where the judge charged that upon the whole evidence the plaintiffs were not entitled to recover.

tinct ruling that the attempted impeachment was a failure, which as we have seen was error, and the defendant excepted. This was all that was necessary to protect the defendant's rights. We cannot of course speculate as to whether this error had any effect upon the result or not. We are not permitted to consider that question. The error is one which cannot be overlooked without establishing a dangerous precedent.

The judgment must be reversed, and a new trial ordered, costs to abide the event.

All concur.

Judgment reversed.

GRAND TRUNK RY. v. IVES.

144 U. S. 408. [*1892.*]

Mr. Justice LAMAR. * * * It is also insisted that the court erred in refusing the following request of the defendant for instructions:

"If you find that the deceased might have stopped at a point fifteen or eighteen feet from the railroad crossing, and there had an unobstructed view of defendant's track either way; that he failed so to stop; that instead the deceased drove upon the defendant's track, watching the Bay City train, that had already passed, and with his back turned in the direction of the approaching train, the deceased was guilty of contributing to the injury, and your verdict must be for the defendant, although you are also satisfied that the defendant was guilty of negligence in the running of the train in the particulars mentioned in the declaration."

The reason given by the court for refusing this request was that "it is too much upon the weight of the evidence and confines the jury to the particular circumstance narrated without notice of others that they may think important." This reason is a sound one. In determining whether the deceased was guilty of contributory negligence the jury were bound to consider all the facts and circumstances bearing upon that question, and not select one particular prominent fact or circumstance as controlling the case to the exclusion of all the others. Cooper v. Lake Shore & Mich. South. Railway Co., *supra;* Baltimore, etc., Rail-

road v. Kane, 69 Maryland, 11.[1] Moreover, the substance of the request, so far as it was correct, had already been given, in general terms, by the court in that part of the charge referring to the degree of care and caution required of the deceased in approaching the railroad crossing, in order to free him from the charge of contributory negligence; and the refusal of the court to give it again, in different language, was not error. Erie Railroad Co. v. Winter, 143 U. S. 60, 75.

Judgment affirmed.

BARR v. THE CITY OF KANSAS.

105 Missouri, 550. [*1891.*]

Action for personal injuries alleged to have been caused by falling into a hole in the street negligently left unguarded by the city. The defendant denied the negligence charged, and set up contributory negligence on the part of the plaintiff. There was a verdict for plaintiff, and defendant appealed.[1]

BRACE, J. * * * Instruction, numbered 2, given for the plaintiff is as follows: "The plaintiff, Mrs. Barr, was only required to exercise ordinary care in passing over Campbell street; and ordinary care is such care as a person of ordinary prudence would have exercised under similar circumstances; and she had the right in crossing the street to assume that the same was in safe condition, unless she knew or had reason to suppose that it was unsafe; and if she did not know or had no reason to suppose that the street was unsafe by reason of the hole in question, then the jury cannot find her guilty of contributory negligence alone from the fact that she was running when she fell into the hole, or that her attention was attracted to some other object so that she did not notice where she was stepping."

[1] Thayer, Circuit Judge in Ins. Co. v. Hillmon, 107 Fed. 834: "Besides, this instruction singled out one fact bearing upon the question whether the corpse that was brought back to Lawrence was Hillmon's body, and gave it undue prominence, inasmuch as there were many other facts and circumstances in evidence which had an immediate bearing on the same question, and might be regarded as very persuasive evidence that the body returned was Hillmon's dead body."

And so in Ry. v. Leak, 163 U. S. 280.

[1] The statement has been condensed.

The crucial question of fact in the case was whether the plaintiff was guilty of contributory negligence, a question that could be fairly determined by the jury only in the light of all the facts and circumstances immediately preceding and attending the injury. This instruction selects out of those facts two of the most important, directly points the attention of the jury to them, and tells them that neither of these acts of the plaintiff alone is sufficient to warrant them in finding her guilty of contributory negligence, leaving in the background and out of sight all the other facts in the case by which these facts might have been qualified and characterized as prudent or imprudent under the actual circumstances of the case. The instruction was well calculated to mislead the jury. They ought not to have been so directed as that they could feel at liberty to consider that any particular fact bearing upon the issue was eliminated from the case, and that they were free to determine it upon what remained. In determining the question of the plaintiff's negligence all the facts and circumstances in evidence bearing upon that issue are to be considered and passed upon, not separately and independently, but in their entirety and in their combination with and relation to each other as shown, and it is the peculiar province of the jury, when thus viewing, to measure them by a standard of prudence and care derived from their own experience of what an ordinarily prudent and careful person would or should have done under the circumstances; and the court cannot select out of those facts some one or more of them and affix to it, or them, an independent value without distorting the comprehensive view the jury should take of the case as a whole.

Whether a person by running in the public streets in one direction, while looking in another, is guilty of negligence is a question of fact for the jury that can be determined in any given case only by considering the two acts in combination with each other, and in connection with all the other attendant facts and circumstances, and it was the province of the jury to weigh and pass upon those acts viewed in such combination and connection, and not alone, or as separate and independent facts. The court in this case, without giving any instruction advising the jury that these acts are to be so viewed and considered, practically deprived the acts themselves of much, if not all, their proper force and significance in the mind of the jury, in the absence of such advice, by telling them that neither of those acts alone will

warrant them in finding the plaintiff guilty of negligence. Upon the same principle the court might have gone on and taken up each fact in the case, and at the end having found that each fact in itself was naught as evidence to charge the plaintiff with negligence, and having so told the jury, without further advice, it would not be a matter of suprise that having been told that each fact was naught they should find that the sum of the facts was naught, and that there was no negligence, when if the facts had been considered in their proper bearing and relation to each other a case of gross negligence might have been made out.

The difference between the instruction supposed and the one in hand is one of degree only, and not of principle; it is a vicious mode of instruction, trenches upon the province of the jury to weigh all the evidence, without bias or comment from the court, and we find no other instruction given in this case curing the one under consideration.

The vice of specially calling the attention of the jury to isolated facts or otherwise giving prominence to a view of the case favorable to one side, while measurably retiring the view of the other side by ignoring it, or presenting it only in general terms, has been frequently condemned by this court. Sawyer v. Railroad, 37 Mo. 263, *loc. cit.;* Anderson v. Kincheloe, 30 Mo. 525; Fine v. Public Schools, 39 Mo. 67; Rose v. Spies, 44 Mo. 23; Jones v. Jones, 57 Mo. 142; Raysdon v. Trumbo, 52 Mo. 38; Chappell v. Allen, 38 Mo. 213. * * *

INLAND NAVIGATION CO. v. TOLSON.

139 U. S. 551. [*1891.*]

Mr. Justice GRAY delivered the opinion of the court.

This was an action brought March 11, 1884, by Tolson against the Inland and Seaboard Coasting Company to recover damages for the crushing of his foot by the negligent management of a steamboat of the defendant. The plaintiff recovered a verdict for $8,000, judgment on which was affirmed in general term. 6 Mackey, 39. The defendant sued out this writ of error.

At the trial it appeared that the plaintiff was the owner and wharfinger of a wharf in the Potomac River, known as Sham-

rock pier, built on piles, in a suitable and substantial manner, early in 1883, and the front of which, twelve feet long, was parallel with the channel of the river, and had three heavy fender piles at each corner; that on September 15, 1883, the plaintiff, having a small basket of pears and an empty demijohn to put on board the defendant's steamboat for Washington, neglected to signal her as she came up the river, and hailed her as she was passing the wharf, whereupon she backed in to make a stern landing, and struck the piles at the lower end of the wharf with considerable force; that at that time the weather was calm and the tide just turned flood, and neither the captain nor the pilot was in the pilot-house.

The plaintiff testified that, while he was standing near the edge of the wharf by the capstan post, ready to catch a line to be thrown from the steamboat, she struck the wharf with such force as to start and break the plank flooring, and to catch and crush his left foot between the planks and that post; and that at that moment the mate of the steamboat reached over and took the basket from his hand.

The defendant called as witnesses the pilot and others on board the steamboat, who testified that the plaintiff, as the steamboat neared the wharf, called out that there was no need to throw a line, and leaned over and handed the basket and demijohn to the mate, and the mate gave the signal to go ahead, and he and the plaintiff shook hands and joked together, and the boat then struck the wharf, and jammed the plaintiff's foot between the wharf and one of the fender piles; that the boat was then turned about and made a bow landing at the wharf for the purpose of rendering the plaintiff assistance, and the plaintiff was taken ashore, and then and there, in the presence of the mate and others, said "that he was hurt by his own fault, that he was standing in a dangerous position." The defendant also introduced evidence that the plaintiff, the next morning, at his own house, explained to two of his neighbors how the accident happened, and said to them "that it was his own fault and nobody else's, that he did not blame any of the boat people," and stated the circumstances of the accident in the same way as the defendant's witnesses.

Upon the comparative weight to be given to the statements made by the plaintiff shortly after the injury, and to his testimony at the trial, the judge instructed the jury as follows:

"It may, at first, seem surprising that a man who himself wears the shoe should not be able to tell where it pinches; that a man who has his foot crushed should not necessarily know better than any other party where it was hurt, and how it was hurt; and yet it is not an uncommon thing for other men who saw the thing done, to be able to tell better than the man himself how the accident happened. The shock and pain may have the effect of rendering the man quite incapable of telling just exactly how the thing took place, so if you find the man at different times making somewhat different statements it does not at all follow that it was his intention to mislead. You are, therefore, to look at any difference of statements that he may have made, if you believe he did make different statements, in that point of view. He may not be the best witness as to what did happen to himself or the manner in which the thing may have happened."

The defendant excepted to this instruction, and contended that it invaded the province of the jury to determine the credit to be given to the plaintiff's various and contradictory statements, by directing them to look at the evidence in a particular point of view, and by treating the shock and pain of the injury as affecting not only his statements made the same evening, but also those made to his neighbors the next morning.

But the instruction, fairly construed, after calling the attention of the jury to two distinct considerations, the one, the effect of the shock and pain (which could not have been understood to apply to statements made after the shock and pain had subsided), and the other, that the making of different statements at different times did not necessarily imply an intention to mislead, suggested to the jury to look at any difference in the plaintiff's statements in that point of view. This was clearly within the judge's authority and discretion in aiding the jury to perform their duty.[1] * * *

BEAUMONT v. BEAUMONT.

152 Federal, 55. [*C. C. A. 1907.*]

GRAY, Circuit Judge. * * * In the case against John L. Beaumont there are seven assignments of error. It will only be

[1] See also York v. Ry., 84 Me. 117.

necessary to consider the first and second. They are as follows:

"First. Because the court instructed the jury, with reference to the testimony of Charles Beaumont as to what Lucius S. Beaumont said and did at the time of the alleged gift, as follows:

" 'You have no right to reject except for good reasons—reasons perfectly satisfactory to you;' adding the following words on that subject: 'You have no right, as counsel for defendant argued in this case, to ignore credible, unimpeached and uncontradicted testimony adduced by the defendant, and if you regard Charles' testimony or any other testimony produced by the defendant in relation to the alleged gift as credible, unimpeached and uncontradicted testimony, why, of course, you cannot ignore it or disregard it, but the facts of this case are such that I feel very sure I would not be justified in saying to you that you were bound to accept as absolute truth all that Charles has testified to. Testimony must be credible in its nature to be influential and must come from a credible source. You are bound, I repeat, to consider very carefully the testimony given by Charles. It is testimony of a most vital character in this case, but as was said by the Supreme Court of New Jersey in the case which I have referred to—I refer to the case of Cooley v. Barcroft, in 43 N. J. Law, 363: "The character of a witness or a number of witnesses may be so impeached, or their story so shattered by cross-examination or rendered so doubtful by inherent improbabilities, that their testimony, standing unopposed by direct counter testimony, would be fairly subjected to suspicion. No court upon review could say, as a legal conclusion, that, under such circumstances, a judgment which ignored such testimony was illegal." ' " * * *

We think the language used by the learned trial judge, as recited in the first assignment, while quite accurately stating, as an abstract proposition, the rights and duty of the jury in regard to credible, unimpeached and uncontradicted testimony, was on the whole, when taken in connection with the allusions made to the testimony of Charles Beaumont, calculated to prejudice the jury unduly against the plaintiff in error. We do not think that any inference could have been drawn by the jury from this part of the charge, other than that, in the opinion of the learned trial judge, the testimony of Charles Beaumont should be considered as inherently improbable, and

that the truth of his story had been shattered by cross-examination, and that they were justified in rejecting it. A careful reading of this testimony has not disclosed to us any ground for such an inference. We do not discover that there is inherent improbability in the story of Charles, or that that story has been shattered by cross-examination. Although the trial judge does not directly assert these things, it seems to be suggested by the manner in which the instruction is framed.[1] * * *

NORFOLK, ETC., RY. v. U. S.

177 Federal, 623. [*C. C. A. 1910.*]

DAYTON, District Judge. * * * Finally, did the court below err, to the prejudice of the defendant, by giving, at the instance of the plaintiff, instructions 4, 5 and 7? These instructions were as follows:

"(4) The court instructs the jury that they can consider the evidence offered by the defendants relating to inspection of the alleged defective car, N. & W. 21158, at Bristol only in so far as it tends to contradict the testimony of the plaintiff's witnesses upon the point as to whether or not the defect as alleged in the declaration did really exist at the time that the said car left Roanoke, Va.

"(5) The fact that the defendant's witness testified that an inspection of N. & W. car 21158 was made at Bristol and that the alleged defect set out in the declaration was not discovered by him can only be considered as tending to contradict the evidence of the government's witness on that point, and its weight is for the jury.

"(7) The court instructs the jury that in passing upon the question of the conflict in the evidence of the government inspectors, and the inspector of the defendant railroad company at Bristol who testified to having inspected car N. & W. 21158, they must consider that one is positive testimony and the other is negative. The inspectors of the government testify that they inspected the coupling and saw that it was defective. There-

[1] See also Weis v. Bethlehem Iron Co., 88 Fed. 23, holding a charge as to weight of the evidence unfair and misleading.

fore the correctness of their testimony depends only on the fact whether or not they swore to the truth; while, on the other hand, in considering the testimony of the inspector of the railroad, there are two things to be taken into consideration: First, did he testify to the truth when he stated that he did not discover the defect in the coupling; second, if he did swear the truth when he so stated, then did he, in examining the train in the limited time in which he claimed to have inspected it, make such close and accurate inspection as to be able to give persuasive evidence in contradiction of the testimony of the government inspectors."

These instructions told the jury that the evidence of the inspector of the company, whose express duty it was to inspect all cars coming into his yard at Bristol with a view to discover and report these very defects in safety appliances, and who has testified that in discharge of that express duty he did inspect this particular car 21158 and found no defect in its coupling device, could only be considered "in so far as it tends to contradict" the testimony of the government inspectors; that such evidence could only "be considered as tending to contradict the evidence of the government on that point" (that is, whether defect in the coupling device existed or not); and that such evidence was negative as to the inspection, while that given by the government inspectors was positive. We think there is error in these instructions, and that they should not have been given for these reasons: First, because they held the evidence to be solely contradictory in character; second, because they tended to give undue weight to the evidence of the government inspectors; and, third, because the evidence of the company's inspector was not negative but positive. We think the District Court for the Western District of Ohio in United States v. Balto. & Ohio R. R. Co. (not reported, but published by the Interstate Commerce Commission in pamphlet form), Judge COCHRAN, charging the jury in a similar case, has rightly held:

"In considering the testimony of witnesses the jury should not give either more or less weight to the testimony of any witness because of the fact that such witness testifies on behalf of the government, or on behalf of the railroad company, but the jury should give to the testimony of each witness that weight which in its judgment it is entitled to from all the facts and circumstances in the case."

The District Court for the Northern District of Illinois, in Atchison, T. & S. F. Ry. Co. (not reported, but published by the Interstate Commerce Commission), has reiterated and approved this proposition. The evidence of the company's inspector was not negative. It is to be remembered that he was employed by the company for the express purpose of inspecting cars and discovering and reporting these and other defects; that he has testified that in discharge of this express duty he inspected this train and this particular car in question; that he lifted all the rods or levers to see if they were in condition from one end of the train to the other, always in accord with a fixed practice of his inspection; and that he found no defect in the coupling device in question. This was positive evidence of a negative fact.

In 17 Cyc. 802, it is well said:

"The marked superiority of positive testimony is most commonly affirmed in those cases where the opposing testimony is what has been hereinbefore denominated 'strictly negative.' If there is evidence that the attention of a negative witness was specially directed to the fact, or it can be legitimately presumed or inferred that he was alert and would have observed had the fact occurred, his testimony that he did not see or hear is not necessarily weaker than opposing positive and affirmative testimony, and may indeed be entitled to more weight than the latter. Where witnesses testify positively to a fact and other witnesses absolutely deny it, the rule of comparative value as between positive and negative testimony does not apply, and the only question is to which side, under all the circumstances, credit is due."

And a large number of authorities are there cited.

In a case directly in point, the District Court of the United States for the Western District of Pennsylvania (United States v. Baltimore & Ohio R. Co., 170 Fed. 456) held:

"Positive testimony is to be preferred to negative testimony, other things being equal; but where it was the duty of an inspector on the part of the railroad company to inspect cars, and he says that he did inspect the cars that came in and did not see certain defective appliances, that is not such negative testimony that it should not receive the same consideration, other things being equal between the witnesses, as positive testimony."

See, also, Denver & R. G. R. Co. v. Lorentzen, 24 C. C. A. 592, 79 Fed. 291.

For this error in giving these instructions the judgment of the court must be reversed, and the cause remanded, with instructions to set aside the verdict and grant a new trial.

Reversed.

STATUTES LIMITING THE CHARGE.[1]

GENERAL STATUTES, MASSACHUSETTS, 1860. (CHAPTER 115.)

§ 5. The courts shall not charge juries with respect to matters of fact, but may state the testimony and the law.

ILLINOIS STATUTES, 1913.[2] (CHAPTER 110.)

[72. CHARGING JURY.] § 72. The court, in charging the jury, shall only instruct as to the law of the case.

[73. INSTRUCTIONS TO BE IN WRITING.] § 73. Hereafter no judge shall instruct the petit jury in any case, civil or criminal, unless such instructions are reduced to writing.

[74. MARKING INSTRUCTIONS—MODIFYING.] § 74. When instructions are asked which the judge cannot give, he shall, on the

[1] These and similar statutory provisions in the various states do not affect the practice in the Federal courts.

MR. JUSTICE GRAY, in Vicksburg, etc., R. R. Co. v. Putnam, 118 U. S. 545: "In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error. Carver v. Jackson, 4 Pet. 1, 80; Magniac v. Thompson, 7 Pet. 348, 390; Mitchell v. Harmony, 13 How. 115, 131; Transportation Line v. Hope, 95 U. S. 297, 302; Taylor on Evidence (8th ed.), § 25. The powers of the courts of the United States in this respect are not controlled by the statutes of the State forbidding judges to express any opinion upon the facts. Nudd v. Burrows, 91 U. S. 426; Code of Georgia, § 3248. The exceptions to so much of the judge's charge as bore upon the liability of the defendant cannot therefore be sustained."

[2] It seems that such a statute impliedly takes away the power to sum up the evidence. Killian v. Eigenmann, 57 Ind. 480; Rose v. Kansas City, 125 Mo. App. 231.

margin thereof, write the word "refused," and such as he approves he shall write on the margin thereof the word "given," and he shall in no case after instructions are given, qualify, modify, or in any manner explain the same to the jury otherwise than in writing. Exceptions to the giving or refusing any instruction may be entered at any time before the entry of final judgment in the case.

MISSOURI REVISED STATUTES, 1909.

[1987. INSTRUCTIONS.] § 1987. When the evidence is concluded and before the case is argued or submitted to the jury or to the court sitting as a jury, either party may move the court to give instructions on any point of law arising in the cause, which shall be in writing and shall be given or refused. The court may of its own motion give like instructions, and such instructions as shall be given by the court on its own motion or the motion of counsel shall be carried by the jury to their room for their guidance to a correct verdict according to the law and evidence; which instructions shall be returned by the jury into court at the conclusion of the deliberations of such jury, and filed by the clerk and kept as a part of the record in such case.

GROWS v. MAINE CENTRAL RY. CO.

69 Maine, 412. [*1879.*]

Case for personal injuries received in a railroad crossing accident. * * *

Upon the evidence in the case it was contended in argument by the plaintiff's counsel that the engineer, under the peculiar circumstances of the case, when he first saw the plaintiff in the way moving towards the crossing, had no right to assume that the plaintiff had seen the train or even knew that it was approaching, and that the law required him to use due care to avoid injuring the plaintiff after he saw him in peril; and that the fact that the engineer did not then sound the whistle, or give the plaintiff any warning, taken in connection with the fact that no statute signals had previously been given, and that the engineer, after

he saw the plaintiff, kept no lookout to watch him, and allowed his train to continue on at the same high rate of speed as before, was a fact to be considered by the jury in support of the allegation that he ran his train recklessly, after he saw the plaintiff in peril.

Upon this point the presiding justice charged the jury in the following language, in which it is claimed that he made an erroneous statement as to the evidence upon a material fact, and expressed an opinion upon issues of fact arising in the case in disregard of chapter 212 of the public laws, 1874:

"Upon this branch of the case, I do not perceive any necessity whatever for me to consider the question whether this was a road where the statute signals were required or not. There is no evidence in the case that the conductor or the engineer saw the plaintiff sooner than the plaintiff saw the train—about thirty-eight rods distant as they were coming out of the cut, as I recollect it, is the testimony when each saw the other. From the time the plaintiff saw the train he had all the notice the statute signals would give him, and, as was said in the opinion of the law court, 'vision was better than hearing.' The object of the statute signals was to give the plaintiff notice that the train was approaching, and if as soon as the engineer saw the plaintiff, the plaintiff saw the train, then so far as this averment in the writ is concerned, that the engineer ran recklessly after seeing him, it is entirely immaterial whether the statute signals were given or not. The averment of the plaintiff upon this branch of the case is that the engineer recklessly ran his train after he saw the plaintiff. The plaintiff saw the engineer as soon as the engineer saw him, so that it does not tend to sustain or disprove this allegation to show that the statute signals were not given. If they were required before the engineer saw him it does not tend to sustain this allegation that the engineer recklessly ran his train after he saw him; and whether they were given after the engineer saw him or not is immaterial because the plaintiff had seen the train, and the ringing of the bell or sounding of the whistle would be no more warning to him than seeing the train itself."

The verdict was for the defendants, and the plaintiff alleged exceptions and also filed a motion to set aside the verdict as against the weight of evidence and against law.

VIRGIN, J. * * * It is contended that the presiding jus-

tice "expressed an opinion upon an issue of fact arising in the case," and that the plaintiff "being aggrieved thereby," is entitled to a new trial, in accordance with the provisions of St. 1874, Chap. 212. The expression of opinion was in the charge. The judge, in illustrating a principle of law, said that, so far as he recollected the testimony, "the plaintiff saw the engineer as soon as the engineer saw him." But a mistake of this kind is not such an expression of opinion upon an issue of fact as is contemplated by the statute.[1] If the judge inadvertently misstate a fact, the counsel should at the time call his attention to it, that it may then and there be corrected by reference to the reporter, if necessary. Bradstreet v. Bradstreet, 64 Maine, 204; State v. Reed, 62 Maine, 128, 137. * * *

EDDY v. GRAY.

4 Allen (Mass.), 435. [*1862.*]

The trial was held before LORD, J., on a complaint under the bastardy act. * * *

During the argument of the complainant's counsel to the jury, the judge interrupted him, saying, "You argue as if the complainant had testified that she has had no sexual intercourse with any other person than the defendant." The counsel replied, "Yes, sir, I so understood her." The judge said, "I do not think she thus testified, but it is for the jury to say." The counsel continued to argue as if she had thus testified. In his charge the judge said to the jury substantially as follows: "You observed that I interrupted the counsel in his argument in relation to the testimony of the complainant. I did not understand her to testify that she had no sexual intercourse with any other person about the time of her alleged connection with the defendant. My attention was called to it, and I was struck with the fact that neither counsel asked the question. The importance of that matter is this: the question is not simply, did the complainant have criminal connection with the defendant, but, is he the father of the child? If she had connection with no

[1] For a case of prejudicial misstatement of the evidence, see Stainbrunner v. Ry., 146 Pa. St. 504.

other person, she knows the defendant to be the father. If she had connection with any other, you may think she does not know, though she may honestly believe the defendant to be the father. Perhaps, in fairness to her, if no inquiry was made of her upon the subject, you may think that her positive and unequivocal declaration that he is the father necessarily involves the denial of intercourse with any other. But the whole matter is with you. You must remember the evidence. The fact that I do not remember a piece of testimony is of no importance, if you remember it; and you must be governed by your recollection, and not by mine." To these remarks the complainant's counsel excepted as being singular, and as a charge upon the facts, in violation of law.

The jury returned a verdict for the defendant, and the complainant alleged exceptions.

MERRICK, J. * * * There was no irregularity in the conduct of the trial by the presiding judge, or in his charge to the jury, which affords any just ground of exception. It was within the province of the court to call their attention to the evidence which had been introduced;[1] the effect of it was distinctly submitted to their consideration and judgment. There was no charge upon any matter of fact, but a mere allusion and reference to the testimony which had been laid before them. This was in

[1] The court may properly state that there was no direct evidence on a given point, and that circumstances were relied on. Maynard v. Tyler, 168 Mass. 107. FOSTER, J., in Durant v. Burt, 98 Mass. 161: "It remains to consider the objection made to the instruction that the fact that both parties were brokers, and might be presumed to know the usages of their business, was entitled to great weight. This is claimed to be a charge upon a matter of fact forbidden by the Gen. Sts. Chap. 115, § 5. This provision of law was considered in Commonwealth v. Barry, 9 Allen, 276, and held to prohibit courts, in charging juries, from expressing an opinion as to the credibility of witnesses. But a judge may "state the testimony;" and this can hardly be done without calling the attention of the jury to the degree of weight and importance to be attached to particular facts, if they are proved or admitted. To say that certain circumstances deserve to be seriously considered, or are entitled to great weight, is not expressing an opinion as to what facts have been proved, but only instructing the jury with regard to the relative materiality and importance of different portions of the evidence. To assist and guide the deliberations of the jury by such comments is no infringement upon their province, but often a duty necessary to lead their minds to an enlightened and discriminating consideration of the case."

conformity to the requirements of the provisions of the statute upon the subject and therefore entirely unobjectionable. Gen. Sts., Chap. 115, § 5. * * *

MORRIS v. LACHMAN.

68 California, 109. [*1885.*]

FOOTE, C. Action to recover damages for slander, in the alleged speaking by Lachman, of and concerning the plaintiff and one Henry Cavendish, the words: "They are horse-thieves and scoundrels."

The defendant filed a second amended answer, in which the main ground of defense was stated to be, that he believed his horse, harness and wagon had been stolen, and did not know the persons who had taken them, and that in using the language complained of he had no reference to the plaintiff, but spoke it of those unknown persons who he honestly believed had committed a larceny of his property. * * *

At the trial it was claimed, on the part of the plaintiff, that the defendant used the language set out in the complaint, of and concerning the plaintiff and Mr. Cavendish, while said Lachman was standing inside the door of Messrs. Lesher and Saunders' store in Oakland, and that plaintiff and Mr. Cavendish were passing by on the street in front thereof, and that just as they went by Mr. Lesher said to the defendant: "There goes the lady and gentleman who left the horse and wagon here, now." To which defendant replied: "Lady and gentleman be damned! —they are horse-thieves and scoundrels." And the plaintiff introduced evidence to show the speaking of the words by defendant as laid in the complaint. * * *

As part of the charge given by the court and excepted to by the plaintiff, after objection duly made, was the following: "In determining the question as to whether the slanderous words charged were spoken about or concerning the plaintiff, it is proper for you to consider whether at this time, when these words were alleged to have been spoken, Lachman knew the person of the plaintiff or not; and if he did not know the person of the plaintiff at this time, how could he have referred to her?

And how could he have pointed her out as the subject of his accusation?"

This is justly criticised as being argumentative, and instructing the jury upon the weight of testimony. By it they are in effect told that if the defendant did not know the plaintiff personally, he could not have referred to her or pointed her out as the object of the accusation contained in his language which is the matter of complaint. At least, it is fairly susceptible of this construction, and may have misled the jury.

The other portions of the court's charge which are objected to were not improper, in view of the declaration of this court as to the right of the trial judge to state the testimony given in a cause to a jury as "tending to prove" a matter. (People v. Perry, 65 Cal. 568; People v. Vasquez, 49 Cal. 560.)

For the error committed, the judgment and order should be reversed and cause remanded.[1]

HERKELRATH v. STOOKEY.

63 Illinois, 486. [*1872.*]

Mr. Chief Justice LAWRENCE delivered the opinion of the court.

This was a contest between the mortgagees in a chattel mortgage and a creditor of the mortgagor, and turned on the validity of the mortgage. The court instructed the jury, if the mortgage was made to hinder, delay and defraud creditors, it was void, even though the mortgagees had just claims against the mortgagor.

The second is objectionable for another reason. In that instruction the jury are told, "if the mortgage was made by a father to two of his sons, in the night time, under suspicious circumstances, and at the same time the father transferred to said sons all his land and personal property, and the property in the chattel mortgage was subject to be consumed or destroyed in its use by the mortgagor, these are circumstances from which the jury may infer that the transaction was a fraudulent one."[1]

[1] See also Renaud v. Bay City, 124 Mich. 29.

[1] GAMBLE, J., in McDermott v. Barnum, 19 Mo 204: "The fifth instruction is, in reality, no instruction upon a question of law. Fraud, as a question of fact, was presented to the jury, and this instruction,

The first objection to this instruction is, that the mortgage was not made to the sons alone, but to them and to several other persons. Another and fatal objection is, that while the circumstances named in the instruction may be suspicious, they do not raise a legal presumption of fraud. They are to be considered in connection with all the other evidence, and it is for the jury to determine, from the entire evidence, what inference is to be drawn, without being instructed by the court as to what weight they are to attach to any particular portion of it. When the court says that a certain inference may be drawn from certain facts, if proven, most juries would understand the instruction as meaning that it was their duty to draw such inference. The instruction would, at least, indicate that the court thought it highly proper the inference should be drawn. There are cases in which such an instruction would not be improper, but under our system of practice in this State, the court should not so instruct, except in cases where the alleged circumstances are of such a character that the law itself raises the presumption.[2]

after detailing several facts, informs the jury that if they find them to exist, they may from them infer that the sale from Rogers & Co. to McDermott was fraudulent. In other words, the jury are told that certain circumstances would justify the conclusion that a conveyance was fraudulent in fact. This is more like a summing up of evidence than an instruction on a question of law. When the law presumes a fact from one or more other facts, the annunciation to the jury of that presumption is a declaration of the law of the case, and differs very materially from telling them, in a case where there is no presumption of law to guide them, that, if they believe that certain facts are proved, then they may infer the existence of the principal fact in question. I repeat that the giving or refusing such an instruction, in such a case, is not properly the decision of any matter of law."

In South Carolina the constitution of 1868 contained the familiar provision that courts should not charge the jury in respect to matters of fact, but might state the testimony and declare the law. In 1895 this section was amended to read: "Judges shall not charge juries in respect to matters of fact, but shall declare the law." In Morris v. Clinkscales, 47 S. C. 488, after an elaborate review of the practice at common law, and under the constitution of 1868, it was held that the amendment of 1895 impliedly took away the power to state the testimony, and limited the court to a statement of the law as applied to hypothetical facts.—ED.

[2] BARCLAY, J., in Moberly v. Ry., 98 Mo. 183: "The instructions given by the court were in the main accurate, but certain errors, nevertheless, crept into them, requiring a reversal of the judgment. Instruction numbered 5, given at plain-

Where one party proves certain facts which the other attempts to explain or overcome by the proof of certain other facts, the jury should be left to draw their own inferences, without any intimation from the court as to what it would be proper to infer from the evidence of either side.

The judgment of the court below is reversed and the cause remanded.

Judgment reversed.

KNOWLES v. NIXON.

17 Montana, 473. [*1896.*]

PEMBERTON, C. J. This is an action to recover a balance alleged to be due on a promissory note. The answer admits the execution of the note, but pleads payment. The case was tried with a jury, and a verdict returned for the plaintiff in the sum of $231.15. From the judgment rendered thereon, and the order of court denying a motion for a new trial, the defendant appeals.

The assignment of error principally relied upon by the appellant is the giving of the following instruction by the court: "The court instructs the jury that although parol proof of the verbal admissions of a party to a suit, when it appears that the admissions were understandingly and deliberately made, often

tiff's instance, should not have told the jury that the law presumed that plaintiff exercised ordinary care while submitting the question of his care or negligence as an issue. The presumption that everyone exercises ordinary care obtains in the absence of evidence to the contrary. But there was abundant evidence from which plaintiff's negligence on the occasion in question might have been fairly found. With that evidence before them, it was calculated to give the jury a wrong impression of its effect to say that a presumption of care then existed in plaintiff's favor. We do not hold that a reference to a disputable presumption would be in all cases erroneous. But we are of opinion that, on the facts presented, it should not have been made here. Where there is evidence tending to remove the presumption a reference to the latter is usually to be avoided. This case is a close one on the issue of contributory negligence. Though there was sufficient evidence to support a verdict for plaintiff, the jury should have been left to make such finding as they considered just, on that issue, without casting into the balance such a reference to the presumption obtaining in the absence of evidence."

affords satisfactory evidence, yet, as a general rule, the statements of a witness as to verbal admissions of a party should be received by a jury with caution, as that kind of evidence is subject to much imperfection and mistake. The party himself may have been misinformed, or may not have clearly expressed his meaning, or the witness may have misunderstood him; and it frequently happens that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party did actually say. If it appears to the jury, from the circumstances proved, that the party himself may have been misinformed, or may not have expressed his own meaning clearly and understandingly, or that the witness may have misunderstood him, or that the witness had no reason or motive for remembering the exact language used, or where, for a lapse of time, or any other reason, the jury can see that the witness is liable to be mistaken, or unable to give the exact words really used by the party, or their equivalents, these matters should be considered by the jury in determining the weight to be given to the testimony."

This instruction is substantially like the instruction commented on with disapproval by this court in Wastl v. Railway Co., *ante*, p. 213. The instruction is evidently taken from Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481. The California court held it to be erroneous, not only because in violation of the constitution of the state, but because it "is, in substance, an argument to the jury with respect to matters of fact that had been presented at the trial, and a comment by the court upon the weight which they should give to the testimony." The court further said: "Whether the facts and circumstances proved in the case were sufficient to cause the reason of the jury to make this inference, was fair matter of argument for the counsel of the respective parties, but the court forsook its judicial position when it assumed the office of commenting upon the weight and credibility of this evidence. The closing paragraph in this instruction, to the effect that it was for the jury to give to the evidence the consideration to which it was entitled, did not obviate the error, as by its remarks the court had, in substance, said to them that, as a matter of law, the evidence was not entitled to any great consideration."

The only issue in the case was whether the note sued on had been fully paid. The court instructed the jury that the burden

of proving this issue devolved upon the appellant. The appellant swore positively to the payment. The respondent testified positively the other way. The only corroborating evidence the appellant had as to payment was the testimony of three or four witnesses that the respondent had admitted to them that appellant had paid the note. In this view of the case, the appellant was entitled to have the admissions of the respondent as to the payment of the note go to the jury for what they were worth in law and fact. The law does not attach slight weight, or treat as a matter of little or doubtful significance, the voluntary admissions of a party against his own interest. The comment and argument of the court contained in the instruction complained of were calculated to cause the jury to attach little weight or significance to the admissions of respondent shown by the evidence. This was calculated to prejudice the appellant. Under our law, it is error for the court to comment, or make an argument, in the instructions, on the weight to be given to the testimony by the jury.

The appellant contends that the evidence is insufficient to support the verdict. There is a conflict in the evidence, and, as that was a matter properly within the province of the jury to determine and settle, we do not feel that we would be authorized to disturb the result on the ground of the insufficiency of the evidence to support it.

On account of the error of the court in giving the instruction treated above, the judgment and order appealed from are reversed, and the cause remanded for new trial.

Reversed.[1]

FEARY v. METROPOLITAN RY. CO.

162 Missouri, 75. [*1901.*]

MARSHALL, J. This is an action for $50,000 damages for personal injuries received by the plaintiff on the 27th of July, 1896. The suit was begun in Jackson county, the venue changed, at plaintiff's instance, to Lafayette county, and resulted in a

[1] Accord—Kaufman v. Maier, 94 Cal. 269; Johnson v. Stone, 69 Miss. 826; Phoenix Ins. Co. v. Gray, 113 Ga. 424 (semble); Gass v. Steiger, 148 Cal. 155 (semble). Contra—Nash v. Hoxie, 59 Wis. 384.

verdict and judgment for the defendant, from which plaintiff appealed. * * *

The defendant's ninth instruction is:

"The plaintiff, Feary, was a witness in his own behalf; the jury are the sole judges of his credibility; all statements made by him, if any, which are against his own interest, must be taken as true; but his statements in his own favor are only to be given such credit as the jury under all the facts and circumstances in evidence deem them entitled to."

It is admitted that a similar instruction was held to be proper in a criminal case. (State v. Brooks, 99 Mo. 137.) But it is insisted that it is error to give it in a civil case. No good reason for such a distinction occurs to the legal mind. Admissions made in court, in the testimony of a party, have the same effect as if made in the pleadings, and admissions in a pleading are taken as true for the purposes of the action. (Shirts v. Overjohn, 60 Mo. 308; Wright v. Town of Butler, 64 Mo. 165.) Statements against interest are called admissions in civil cases, and confessions in criminal ones. They are taken as true for the purposes of the case, because no man would make them if they were not true. If confessions are enough to hang a man or to send him to the penitentiary under the criminal statutes, it is hard to see why admissions should not be enough to conclude him in a civil suit. Greenleaf on Evidence (16th Ed.), § 170, says: "The rules of evidence are in both cases the same."

In Payne v. Railroad, 30 S. W. Rep. 150, speaking to a similar instruction, MACFARLANE, J., said: "He is conclusively bound by every declaration and admission against his interest made while testifying before the court and jury. (State v. Brooks, 99 Mo. 142, and cases cited.)"[1] * * *

VALLIANT, J., dissenting. * * * Defendant's ninth instruction is: "The plaintiff Feary was a witness in his own behalf; the jury are the sole judges of his credibility; all statements made by him, if any, which are against his interest, must be taken as true; but his statements in his own favor are only to be given such credit as the jury under all the facts and circumstances in evidence deem them entitled to."

This instruction is inconsistent in its own terms. It first informs the jury that they are the sole judges of the credibility

[1] See also Conner v. Ry., 181 Mo. 397.

of the particular witness, and then undertakes to control them in that respect. It informs them, in effect, that whatever the witness may have said against his own interest, whether casually or deliberately, lightly or solemnly, the jury must take as absolutely true, but they must beware of him when he speaks in his own behalf.

An instruction of this kind has upon several occasions been approved by this court in a criminal case, but it has never had the unanimous approval of the court. In State v. Young, 99 Mo. 666, Judge SHERWOOD demonstrated that the giving of such an instruction is an invasion of the province of the jury and forbidden by law. The jury are the sole judges of the credibility of the witnesses, and the court has no right to single out one and lay down rules for the jury to ascertain what weight they ought to give his evidence. But the majority of the court held in that case that the instruction was right, and that decision seems to have been grounded on the statute which, while it removed the common-law disability of the accused and the husband and wife of the accused in a criminal case to testify in his or her behalf, provided "such facts may be shown for the purpose of affecting the credibility of such witness." The learned judge, just mentioned, pointed out that that provision of the statute was only intended to allow the State to show in evidence that the witness was the husband or wife of the accused as a fact for their consideration, but it did not authorize the court to call that fact to the attention of the jury in an instruction and comment on it. The decision in that case has been followed in other criminal cases, and perhaps it is now to be regarded as settled. But this is the first instance within my observation in which such an instruction has been before this court in a civil case, and whilst I am free to confess that I see no essential principle upon which it could be held inapplicable to a civil, if applicable to a criminal case, unless it be that the temptation to shield one's self or one's wife or husband by perjury from the consequences of conviction of crime, is greater than that under the influence of mere pecuniary interest, yet I am unwilling to sanction the extension of the field in which such an instruction may be used. The instruction was harmless in this case, but it should not be approved for a precedent.

ROCKWOOD v. POUNDSTONE.

38 Illinois, 199. [*1865.*]

Mr. Justice BREESE delivered the opinion of the court.

This was an action of trespass *quare clausum fregit* brought by defendant in error against the plaintiff in error. The general issue, alone, was pleaded, and verdict for the plaintiff. Motion for a new trial was overruled and judgment on the verdict.

It was admitted on the trial that the plaintiff was, at the time of the alleged trespass, in possession of the southwest quarter of section two, and of the northwest quarter of section eleven, township thirty-two north, range three, and that the defendant tore down one hundred and sixty rods of fence, claimed by the plaintiff to be upon the west line of said section two, and twenty rods of fence claimed to be upon the west line of said section eleven, but claimed by defendant to have been wholly upon the southeast quarter of section ten, each of which last named tracts, it was admitted, were then in the possession of Rockwood.

The dispute is as to the location of the line between sections two and three and ten and eleven, as established by the United States surveyor. The proofs show that the township of Farm Ridge, in which the lands are situate, was, in the first instance, very badly surveyed by the government surveyor, rendering it very difficult, half a century elasped since the survey, to find a government corner, so called. Much testimony was heard on both sides on this point and several practical surveyors were examined. We have considered the testimony carefully, but do not deem it necessary to discuss it, as our attention has been more particularly called to the law of the case, as laid down by the court in the instructions.

It is insisted by the appellant that the court erred in giving the seventh and ninth instructions for the plaintiff. The seventh is as follows: The affirmative testimony of a witness to a certain fact, as for instance, that he saw a government mound and ditch at a certain point, may be regarded by the jury as stronger proof than the testimony of a witness who swears that he did not see such a mound and ditch.

We do not understand it is the province of the court to tell the jury in a case where there is much and conflicting testimony,

or indeed in any case, which evidence is the strongest.[1] It is not true that affirmative testimony is to be preferred before negative testimony, so called, under all circumstances, and that is the purport of this instruction, and was calculated to bias the mind of the jury very much. The value of all testimony is to be ascertained by the jury by weighing it, and to find whichever way it may preponderate. This instruction should not have been given. * * *

KAVANAUGH v. CITY OF WAUSAU.

120 Wisconsin, 611. [*1904.*]

MARSHALL, J. * * * The instruction requested, to the effect that in judging of the credibility of plaintiff's evidence the jury might properly consider his interest in the result of the trial, the temptation under the circumstances to color his testimony favorably to himself, and everything bearing on the subject, and give such evidence such weight only as in their judgment it was entitled to, and that a like test should be applied to evidence of each of the witnesses who testified in the case, was a correct statement of a legal principle. It was not only proper for the jury to consider the interest of plaintiff in the result of the trial, and every other circumstance appearing in the case reasonably calculated, in any view thereof, to throw light upon its credibility and weight, and to subject the evidence of each witness who testified to a like test, but it was their duty to do so; and the instruction might properly have been framed so as not to convey the idea to the jury that it was competent for them, in their discretion, to omit such test. The instruction being correct in principle applicable to the case—peculiarly so since a decision in respondent's favor depended largely upon the weight to be given to his evidence—and such principle not being in any respect embodied in the general charge, prejudicial error was committed in refusing it. Framed as it was, so as to indicate to the jury that the evidence of each witness should be subjected to the same test as the one applied to that of the plaintiff in determining the weight to be given

[1] And so in Ry. v. Brooks, 81 Ill. 245; Ry. v. Shires, 108 Ill. 617.

thereto, it did not invade the province of the jury or violate the rule that the evidence of one witness should not be, in the instructions, singled out and given prominence by special comment thereon.[1] Chicago & A. R. Co. v. Anderson, 166 Ill. 572, 46 N. E. 1125; Pennsylvania Co. v. Versten, 140 Ill. 637, 30 N. E. 540; McDonell v. Rifle Boom Co., 71 Mich. 61, 38 N. W. 681; People v. Knapp, 71 Cal. 1, 11 Pac. 793.

By the court: The judgment is reversed, and the cause remanded for a new trial.

RAY v. WOOTERS.

19 Illinois, 82. [*1857.*]

This was a trial in the Circuit Court of an action for slander. There was a verdict and judgment in favor of the plaintiff below for two hundred and seventy-five dollars. The bill of exceptions states that the court gave the instructions as modified—"Thereupon the court proceeded orally to explain and qualify said instructions to the jury." The cause was tried before BREESE, Justice, and a jury, at September term, 1857, of the Marion Circuit Court.

SKINNER, J. The court, after giving, at the instance of the defendant below, several instructions in writing, as the bill of exceptions states, "proceeded orally to explain and qualify said instructions to the jury." The statute provides: "That hereafter no judge of the Circuit Court shall instruct the petit jury, in any case, civil or criminal, unless such instructions are reduced to writing"—"and he shall in no case, after instructions are given, orally, qualify, modify or in any manner explain the same to the jury." Statutes 1856, 829.

This statute plainly inhibits the Circuit Courts from changing or in any measure affecting orally the law as stated in written instructions given; and in a case of so clear intention of the law-making power, there is no room by construction to avoid consequences, however inconvenient in practice, or detrimental to the administration of justice.

The law being so written, the courts must submit to and abide

[1] For the usual instruction covering the various matters affecting credibility, see Wright v. Kansas City, 187 Mo. 678.

the mandate, and trust to the wisdom of the legislature for such change as experience may suggest. It is true, it does not appear what the oral explanations and qualifications were; yet the words import a modification, limitation, restriction or construction of the written instructions, and, therefore, a change in some degree of the law as stated in writing. This is plainly forbidden.[1]

We presume the court did not intend, without consent of the parties, in any material matter of law, to orally instruct the jury; but from the language of the bill of exceptions, we can treat the case only in the light before stated; although upon the argument it is conceded that the explanations so orally given were in fact immaterial.

Judgment reversed and cause remanded.

Judgment reversed.

(c) *Requests and Exceptions.*

FORD v. LACY.

7 Hurlstone & Norman, 151. [*1861.*]

Declaration. That the defendant broke and entered certain land of the plaintiff's, situate at Walthamstow in the County of Essex, abutting towards the north and east on the River Lea; towards the west, on land in the possession of the defendant, etc., and cut grass there, etc.

Pleas. First, not guilty. Secondly, not possessed. Thirdly, that the close was the land and freehold of T. Beale, and that the defendant, as the servant and by the command of T. Beale, com-

[1] Compare COLE, J., in Millard v. Lyons, 25 Wis. 516: "After the circuit judge had charged the jury upon the law of the case, one of the jury asked him 'whether the plaintiff had the right to use the defendant's divided grain to feed the stock and sheep.' The circuit judge answered that he would not have the right by law. It is now insisted on the part of the defendant that this answer by the circuit judge to the question of a juror was a 'charge,' within the meaning of chap. 101, Gen. Laws of 1868, and, not having been reduced to writing, should reverse the judgment. The word 'charge,' as used in that statute, was not intended to include any and every question and answer passing between the court and jury. It doubtless refers to the address made by the judge after the case has been closed, when he comments upon the

mitted the trespasses complained of. Fourthly, that before the alleged trespasses T. Beale being seized in fee of the said land demised the same to the defendant for a term not yet expired, by virtue whereof the defendant entered upon the land and became possessed thereof for the term, whereupon the defendant in his own right during the term committed the trespasses.

The plaintiff took issues on the pleas.

At the trial, before WIGHTMAN, J., at the last assizes for the County of Essex, it appeared that the action was brought for a trespass on certain narrow slips of land situate on the Middlesex side of the River Lea, and which had originally formed part of its bed but had been left dry. There was evidence that the River Lea had been the boundary of the County of Essex and of the parish of Walthamstow, and that the whole of the bed of it was in that county and parish. * * *

The defendant's case was, that the land belonged to Beale and that it was in Middlesex. He contended that, though the River Lea might change its course, in law it continued to be the boundary of the two counties. He put in the Edmonton Enclosure act, 40 Geo. 3 (not printed), and the award of the commissioners made under it in 1804, showing that the allotment to Beale extended to the river side. Witnesses called by the defendant said that the river was the boundary of the County of Middlesex; and an old map of Essex was produced showing the river as the boundary of the County of Essex. The witnesses said that the cattle on the meadow had always grazed over the land, but did not deny that the plaintiff had mowed the grass every year for fifty years.

The learned judge left it to the jury to say: First, whether the pieces of land were in the County of Essex? Secondly, whether they were in the parish of Walthamstow? Thirdly,

testimony, or instructs the jury in any matter of law arising upon it. Suppose the circuit judge had answered the question by the monosyllable 'no,' which, indeed, was all his answer amounted to. Will it be claimed that before he could answer he must write the word 'no,' and then read it to the jury? We think it quite safe to say that the statute never contemplated any such thing. The judgment of the circuit court must be affirmed."

In the absence of such statutes, the court may instruct orally, or in writing, in its discretion. Smith v. Crichton, 33 Md. 103.

The statute is not sufficiently complied with by writing out a charge after it has been delivered orally. Dixon v. State, 13 Fla. 636.

whether they were in the possession of the plaintiff? Fourthly, whether they were the property of Beale, the defendant's landlord? His lordship stated at the same time that the answer to the last question would, in the judgment of the jury, probably depend on the acts of ownership exercised by the defendant's landlord, which were consistent with and probably showed the existence of a right of common. The jury having answered the three former questions in the affirmative, and the last in the negative, the verdict was entered for the plaintiff.

LUSH, in Easter term, obtained a rule for a new trial, on the ground that the learned judge ought to have directed the jury that land left by a river becomes part of the adjoining property and county. He referred to Schultes on Aquatic Rights, p. 138.

* * *

BRAMWELL, B. I do not dissent from any of the propositions of law stated by Mr. CLARKE. For myself I am inclined to think that this was in fact a case of gradual accretion, where the land ought to have belonged to the defendant's landlord. Possibly there were considerations which showed that it did not. Mr. CLARKE is right when he says that the adjoining owner is entitled to the benefit of gradual accretions. But he fails to show that there was any misdirection. A judge is not bound to submit every perplexing point to the jury, and in case of non-direction we are only bound to interfere when the verdict is against evidence, and part of the explanation of the miscarriage is that the judge omitted to direct the jury properly. But the rule is not moved on the ground that the verdict is against evidence. Therefore, without saying that I am satisfied with the verdict, or that the defendant ought not to have succeeded; without saying that it would not have been better that the learned judge should have adverted more fully to the law of accretion, I think that the direction was sufficient, and therefore the rule must be discharged.

CHANNEL, B. I agree that the rule must be discharged. If I am at liberty to review the evidence, I cannot say that I think it was all one way. But it is not necessary to do that, because the rule was not moved on the ground that the verdict was against evidence. As to the ground of misdirection, four questions were left to the jury. In a certain sense the question of imperceptible accretion was properly left to the jury, and they must have considered it. It is said that it was a misdirection

of the learned judge not to have stated the law more fully to the jury. But I agree with my brother, BRAMWELL, that before setting aside the verdict on that ground, we ought to see that the jury have formed a wrong estimate of the value of the evidence in consequence of the omission. But I am not prepared to say that the verdict was wrong; and I entirely agree that the rule as to the property in the soil of private rivers, is that laid down by Lord HALE in the passages cited by my brother, MARTIN.

Rule discharged.

TEXAS AND PACIFIC RY. CO. v. VOLK.

151 U. S. 73. [*1894.*]

This was an action against a railroad corporation incorporated by act of Congress, to recover for personal injuries. * * *

The court overruled the exception that the petition did not show that the plaintiff was without fault or negligence. The defendant, thereupon, in support of the answer setting up contributory negligence of the plaintiff, "introduced evidence tending to show that at the time of accident the plaintiff was on top of the car from which he was thrown, and walking upright with his face towards the approaching engine; and further evidence tending to show that the car upon which plaintiff was at work was separated from certain other cars on said track by an open space of fifty or sixty feet, and that the engine in motion ran against and struck certain other cars on said side track, pushed them over this intervening space, and ran them against the car upon which plaintiff had been at work. But the court did not charge upon contributory negligence; to which the defendant excepted." * * *

Mr. Justice GRAY, after stating the case, delivered the opinion of the court.

By the settled law of this court, not controverted at the bar, contributory negligence on the part of the plaintiff need not be negatived or disproved by him, but the burden of proving it is upon the defendant. Inland & Seaboard Co. v. Tolson, 139 U. S. 551, 557. The omission of the court to instruct the jury upon the subject of the plaintiff's contributory negligence is not open to exception, because the bill of exceptions does not show

that the defendant requested any instruction upon that subject. In England it is a misdirection, and not non-direction, which is the subject of a bill of exceptions. Anderson v. Fitzgerald, 4 H. L. Cas. 484, 499. In this country, the rule is somewhat more liberal; and the not giving an instruction upon a point in issue may be excepted to, if one was requested, but not otherwise. In a very early case, Chief Justice MARSHALL said: "There can be no doubt of the right of a party to require the opinion of the court on any point of law which is pertinent to the issue, nor that the refusal of the court to give such opinion furnishes cause for an exception." Smith v. Carrington, 4 Cranch. 62, 71. As afterwards more fully stated by Mr. Justice STORY, "it is no ground of reversal that the court below omitted to give directions to the jury upon any points of law which might arise in the cause, when it was not requested by either party at the trial. It is sufficient for us that the court has given no erroneous directions. If either party deems any point presented by the evidence to be omitted in the charge, it is competent for such party to require an opinion from the court upon that point. If he does not, it is a waiver of it." Pennock v. Dialogue, 2 Pet. 1, 15. See also Express Co. v. Kountze, 8 Wall. 342, 353, 354; Shutte v. Thompson, 15 Wall. 151, 164. A request for instructions, being necessary to entitle the excepting party to avail himself of an omission to instruct, cannot be presumed, but must affirmatively appear in the bill of exceptions.

The writ of error appears to this court to have had no plausible ground to support it, and to have been sued out merely for delay. The motion of the defendant in error is therefore granted, and the

Judgment affirmed, with interest and ten per cent damages.

STUMPS v. KELLEY.

22 Illinois, 140. [*1859.*]

WALKER, J. This was an action on the case brought in Cook County Court of Common Pleas to the September term, 1857, by appellee and against appellant. The first count of the declaration alleges that appellant did theretofore wrongfully and injuriously keep a certain red and white cow, well knowing that

the same was accustomed to hook, attack and push with her horns; that the cow did attack and push with her horns, the plaintiff, and greatly wounded, bruised and injured the shoulder and arm of the plaintiff, whereby she became sick, etc., for a long space of time, and was injured in consequence, in her health and constitution, and was prevented from pursuing her ordinary avocation, etc., and was put to great expense, etc., in being cured. * * *

The defendant filed the plea of general issue, to which the similiter was added. At the November special term, 1857, the cause was tried by the court and a jury, and resulted in a verdict in favor of the plaintiff for $500.

The defendant moved the court for a new trial, which motion was overruled, and a judgment entered on the verdict against the defendant, from which she appeals to this court. * * *

Courts are created and established for the administration of justice, and all legal and proper means should be employed for the attainment of that end. And how it can be error for the court to instruct the jury as to the law of the case, whether asked to do so or not, we are at a loss to conjecture. We have been referred to no authority that so holds, and we cannot imagine that such can exist. One of the very objects of having a judge is to instruct the jury on the law applicable to the case. Instead of its being error for the court on its own motion to instruct, where it seems to be required by the justice of the case, it is rather the duty of the judge to give such instructions. The instructions given by the court in this case, without being requested by either party, we think embrace the law as applicable to the case, and it is not denied that it does. And we have no hesitation in saying that so far from its being error, that the court acted in strict conformity with the duty imposed by the oath of the judge, and the requirements of the law.[1] * * *

OWEN v. OWEN.

22 Iowa, 270. [*1867.*]

Action at law by wife against husband, during coverture, to recover the sum of $1,600, the value of certain 7-30 United

[1] Contra by statute in Mississippi. —ED.

States bonds. In the petition it is alleged that these bonds were, by the defendant, given to the plaintiff "out of love and affection and for and in consideration of plaintiff's again living with defendant;" that they were delivered to her; that she had them for the space of six months, and that the defendant afterward procured them from the plaintiff, and sold and converted them to his own use. The answer specifically denies every material allegation in the petition. There was a trial, to a jury, upon testimony introduced by either party (all of which is in the record on this appeal). The cause was submitted to the jury without instructions from the court, and a verdict returned in favor of the plaintiff for $1,600. Defendant moved for a new trial, first, because the verdict was contrary to law; second, because contrary to evidence; third, because, from the amount and nature of the controversy, it is apparent that justice requires that a new trial be granted.

This motion being denied, the defendant excepts and appeals.

DILLON, J. In the exercise of our jurisdiction as an appellate tribunal, we are of opinion that it is our duty to reverse this judgment and remand the case for a new trial. After a careful review of the testimony, we are satisfied that, assuming, what the defendant seemed to concede, that such an action is maintainable, the verdict was not justified by the evidence.[1] * * *

From this general statement of the case it will be seen that it was most undeniably one in which there should have been clear instructions to the jury, as to the law governing it, and the rights of parties. To submit it to the jury without any directions to guide them, from the court, would be to reach a result almost as uncertain as the toss of a copper or the throw of dice.

It may be said that the counsel did not request instructions, and that therefore it was not obligatory on the court to give any. Such a view does not accord with our conception of the functions and duty of the judge. He should see that every case goes to the jury so that they have clear and intelligent notions of precisely what it is that they are to decide.[2] His charge is their

[1] The omitted evidence made it improbable that the bonds had ever been given to plaintiff.

[2] Much the same rule was stated in York v. Barnes, 39 Neb. 834, which was a case of misleading instructions rather than a total failure to instruct.

Compare CARTWRIGHT, J., in Osgood v. Skinner, 211 Ill. 229: "No instructions were asked on the part of the plaintiffs, and the court hav-

chart and compass. In this case the jury should have been told that any promise by the defendant to pay or to give money to his wife, to induce her to live with him again, was without consideration, and not binding, especially so, as it did not appear that she had any grounds whatever for not living with him.

The attention of the jury should also have been called to this precise point, viz.: Did the defendant ever deliver bonds to the plaintiff, and, if so, for what purpose? If they were merely put into her custody (which is a view not absolutely inconsistent with even her own testimony) then she cannot recover their value. If, on the other hand, the defendant voluntarily made an absolute gift of them to the plaintiff and delivered them to her, as her own, then he would be liable or not liable, the judge stating which, according to his view of the law, if the defendant afterward, without her consent, took and converted them to his own use.

Although the case was submitted in hotchpotch, still we should not, for this reason, have reversed the judgment, if the result had been one which effectuated justice between the parties. What point the jury allowed the case to turn upon, what facts they decided, passes the wit of man to know. We can only suppose that they would have reached a just result, if the issues and the questions of fact and the law applicable thereto had been properly mapped out to them by the court.

Reversed.

LOW v. HALL.

47 N. Y. 104. [*1871.*]

Appeal from order of the general term of the Supreme Court in the first judicial district, granting defendants' motion for a new trial, upon a verdict taken under the direction of the court

ing refused the instructions asked for by the defendant, no instructions were given. It is assigned for error that the court erred in failing to instruct the jury as to the law, but the only duty of the court is to give or refuse such instructions as are asked by the parties. (Drury v. Connell, 177 Ill. 43.) Parties have the privilege of tendering such instructions concerning the law as they may deem necessary, and the practice act requires the court to mark them as given or refused, but

at circuit, subject to the opinion of the court at general term.

This action was brought by the plaintiffs, as manufacturers and proprietors of "Low's highly perfumed brown Windsor soap" to recover penalties imposed by section 4, of the act of 1862, as amended, etc., for an alleged violation of their trade mark by the defendants, on the allegation that said defendants "did, knowingly, expose, offer for sale and sell, in the city of New York, a spurious article called 'Low's highly perfumed brown Windsor soap,' with false stamps, labels, and impressions thereon, with intent to defraud the public and the buyers, and consumers of the genuine brown Windsor soap of the plaintiffs, contrary to the statutes aforesaid."

On the trial defendants produced evidence tending to show that the sale complained of was done without any motive to defraud; and that the purchaser had full information that the article sold was an imitation. The court concluded the charge as follows:

"I rule, that if the jury should find precisely as the defendants' witnesses say, still they are liable.

"I direct the jury to find a verdict for plaintiffs for $200."

Defendants' counsel excepted to the ruling of the court.

Also, to the refusal of the court to submit the case to the jury.

GROVER, J. The counsel for the appellants insist, that as the respondents' counsel did not request the court to submit any question of fact upon which there was a conflict of testimony to the jury, his exception to the direction to the jury, to find a verdict for $200 for the plaintiff, does not enable him to raise any such question upon appeal, and cites Winchell v. Hicks, 18 N. Y. 558, in support of his position. The rule adopted in that case has no application to the facts in the present. In this the judge decided, that if the jury should find precisely as the defendants' witnesses say, still they were liable, and thereupon directed the jury to find a verdict for the plaintiffs; to which

only authorizes exceptions to the giving or refusing of an instruction. The court may modify or qualify an instruction as tendered and a party may except to the refusal to give as asked, and the court may also give instructions without request. A party cannot complain that the court has not given an instruction unless it has been prepared and tendered for that purpose."

And so in Morgan v. Mulhall, 214 Mo. 451.

the defendants' counsel excepted. This exception presents the question, whether, assuming the facts to have been precisely as testified by the witnesses for the defendants, they were liable to the penalties imposed by the fourth section of chapter 306 of Laws of 1862, page 513, entitled "An act to prevent and punish fraud in the use of false stamps, brands, labels or trade marks," as amended by section 2, chapter 209, Laws of 1863. That question is, whether, to render the party making the sale liable to the penalty, such sale must be made with intent to defraud some person or persons, or some body corporate, as the testimony of the defendants' witnesses shows clearly that the defendants had no such intent in selling the single package of soap to the witness Peckham. A careful reading of the section shows clearly, I think, that the sale in question must have been so made, or the penalty thereby imposed was not incurred. * * *

BROWNING v. WABASH RY. CO.

124 Missouri, 55. [*1894.*]

BARCLAY, J. This is an action to recover statutory damages, on account of the death of plaintiff's husband, ascribable, as she charges, to negligence of defendant, in particulars which will appear later.

The pleadings need not be detailed. They made certain issues, hereafter shown, which were submitted for trial before Judge Burgess and a jury. * * *

Touching the measure of damages, the following expression of opinion, prepared by my learned brother, Gantt, is approved and adopted, namely:

"The instruction on the measure of damages is also assailed as error.

"The instruction was in these words: 'If the jury find for the plaintiff they will assess her damages at such sum as in their judgment will be a fair and just compensation to her for the loss of her husband, not exceeding the sum of $5000.'

"The defendant asked no instruction on the measure of damages whatever. No attempt was made by it to point out the

proper elements of damage in such cases or to modify the general language of the instruction.

"The instruction is not erroneous in its general scope; and if, in the opinion of counsel for defendant, it was likely to be misunderstood by the jury, it was the duty of the counsel to ask the modifications and explanations, in an instruction embodying its views.

"The court is not required in a civil case to instruct on all questions, whether suggested or not, and as there is nothing in the amount of the verdict to indicate that the jury were actuated by any improper motive in their assessment, the general nature of the instruction is no ground for reversal."[1]

The judgment is accordingly affirmed.

HALL v. CEDAR RAPIDS RY. CO.

115 Iowa, 18. [*1901.*]

Action at law to recover damages for personal injuries received by plaintiff while alighting from a car owned and operated by defendant company. There was a trial by jury, resulting in a verdict and judgment for plaintiff, and defendant appeals.

DEEMER, J. The instruction relating to the measure of plaintiff's recovery in the event the jury found in her favor was as follows: "In estimating the damages, if any you find, you will allow plaintiff for any physical suffering and pain and mental anguish, if any, she has suffered and shown in evidence, or which she may in the future suffer, if any, in consequence of the alleged injury, and a reasonable allowance for any physician's bills, if any, she has expended in consequence of said injury, and shown in evidence, but not to exceed the amount claimed in plaintiff's petition." This instruction was clearly erroneous, in that it permitted the jury to enter into the realm of speculation regarding plaintiff's future suffering. Such a charge has frequently been disapproved by this court. Fry v. Railway Co., 45 Iowa, 417; Reed v. Railroad Co., 57 Iowa, 25; Stafford v. City

[1] Accord—Buzzell v. Emerton, 161 Mass. 176.

And so where an instruction failed to define a term used. Taylor v. Seil, 120 Wis. 32.

of Oskaloosa, 57 Iowa, 751; Ford v. City of Des Moines, 106 Iowa, 96. It was not cured, even if it could be cured, by any subsequent instruction. But plaintiff insists that defendant may not complain, because it asked no instructions relating to the subject. If the instruction had been good as given, defendant could not, in the absence of request, complain of it. But it was the duty of the trial court, in giving its instructions, to announce correct principles of law. If it erred in this respect, failure of defendant to ask proper ones will not cure the error.[1] These rules are fundamental, and need no citation of authorities in their support. * * *

Judgment reversed.

SIMONDS v. OLIVER.

23 Missouri, 32. [*1856.*]

This was an action originally commenced before a justice of the peace, to recover twenty dollars, alleged to have been overpaid by plaintiff in making change. Plaintiff obtained judgment before the justice, and the cause was appealed to the law commissioner's court.

Upon the trial before the law commissioner's court, the plaintiff introduced testimony tending to prove that defendant (Oliver) purchased of plaintiff a lamp at the price of three dollars; that in payment thereof he offered plaintiff a twenty dollar gold piece; that plaintiff, not having the specie to give in change, defendant then offered him a twenty dollar bill, that plaintiff gave back to defendant the twenty dollar bill, and seventeen dollars in change. There was no evidence tending to prove that the twenty dollar gold piece ever came to the possession of plaintiff. Defendant, whose admissions constituted the only testimony introduced, declared that he had left the gold piece upon the counter of plaintiff.

The defendant asked the following instructions: "1. If the jury believe from the evidence, that the plaintiff has failed to

[1] Accord—Ry. v. Cove, 29 Ky. L. Rep. 836.

But in many similar cases the courts have gone to extreme lengths to support the instruction as partial non-direction only, in the absence of any request for an instruction covering the point.—ED.

prove that there was an actual carrying away of the twenty dollar gold piece in question, then the jury will find for the defendant. 2. If the jury believe from the evidence, that the plaintiff has failed to prove an actual deficit on his part, then the jury will find for the defendant."

The court refused to give the instructions asked. Defendant excepted, and further asked the court to instruct the jury in some manner, without specifying any particular instruction to be given. The court failed to do so, and the cause was submitted to the jury entirely without instructions. The jury found for plaintiff, and judgment was accordingly given for him. Defendant appealed to this court.

LEONARD, Judge, delivered the opinion of the court.

There is no error in the record, and it is difficult to imagine why the case was brought here. The controversy turned exclusively upon a single question of fact, and this was submitted to the jury who fairly passed upon it, after hearing all the evidence tendered by either party.

The specific instructions asked by the defendant were improper, and rightly refused.[1] The English custom of summing up the evidence, and charging the jury as to the whole law of

[1] BALDWIN, J., in Catts v. Phalen, 2 Howard (U. S.), 376: "A party cannot assign for error the refusal of an instruction to which he has not a right to the full extent as stated, and in its precise terms; the court is not bound to give a modified instruction varying from the one prayed. Here they were asked to instruct the jury that the belief of the plaintiff that the ticket had been fairly drawn, and the consequent payment, prevented a recovery, without referring to the fact in evidence that that belief was caused by the false and fraudulent assertions of the defendant."

MR. JUSTICE MILLER, in Worthington v. Mason, 101 U. S. 149: "The errors assigned in this case relate solely to prayers for instructions refused by the court and to exceptions to its charge. The bill of exceptions shows a paper signed by the defendants' counsel, in which the court is asked to affirm a series 'of propositions of law as governing the case,' seven in number. They were presented as a whole, refused as a whole, and excepted to in the same manner. If any one of them was rightfully rejected no error was committed, because it was not the duty of the court to do anything more than pass upon the prayer as an entirety. Beaver v. Taylor et al., 93 U. S. 46; Transportation Line v. Hope, 95 Id. 297. We shall presently see why there is no error in the rejection of this prayer."

Where the statute provides for written requests, the request must be properly formulated in writing to support an exception. Hacker v. Heiney, 111 Wis. 313.

the case, does not prevail in this state; and, we believe, never has prevailed here. In our practice, each party asks specific instructions upon such points as he may deem material, and the courts generally submit the case to the jury upon these instructions, unless they think proper to give others of their own suggestion, as a substitute, or in addition. However desirable it undoubtedly is that the courts, whose duty it is to see that justice is administered according to law, should take upon themselves the active duty of seeing that the jury are properly instructed upon the law which they must apply to the facts in making up their verdict, they have never been considered bound to charge otherwise than as specifically asked, and, accordingly, the refusal to do so has never been treated here as an error for which the judgment could be reversed.

Let the judgment be affirmed.

O'NIEL v. ORR.

3 Scammon (Ill.), 1. [*1842.*]

This was an action of replevin, instituted in the Peoria Circuit Court, in the name of Robert O'Niel and Andrew Gray, against Christopher Orr and others, for a steamboat called the Tennessee. Gray subsequently filed an affidavit stating that he was made a plaintiff without his consent, and that, so far as he was concerned, he desired the suit to be dismissed. Whereupon the court ordered that the plaintiffs be severed, and that the suit proceed in the name of Robert O'Niel, as sole plaintiff,

On the trial the plaintiff proved, among other things, that one Phillips sold the boat to O'Niel; that $500, a part of the purchase money, was paid down, and the balance secured to be paid at a future time, by a deed of trust.

The defendants claimed the right to the possession of the boat by virtue of the lien of an execution against Phillips, alleged to be in the hands of the sheriff of Peoria county, at the time of the sale to O'Niel. The plaintiff contended that the boat was in Missouri at the time of the sale; and after the evidence had been heard, requested the court to instruct the jury, "That if the jury should believe, from the evidence, that the steamboat

Tennessee, was in the county of Peoria, at the time of the issuing of the execution read in evidence in this cause, and if the jury further believe, from the evidence, that the said steamboat Tennessee was removed from the state of Illinois into the state of Missouri, by the defendant in said execution, and there fairly and *bona fide* sold by the said Thomas Phillips to the plaintiff, without any knowledge on the part of said Phillips, or said plaintiff, of the existence of said execution, that after such sale, so made, the property could not afterwards be levied on by the said execution;" which instruction was given by the court, but with the following qualification:

"That in order to constitute a *bona fide* purchaser, the consideration must be actually paid, and not merely secured to be paid." The plaintiff excepted to this qualified instruction, and a bill of exceptions was signed and sealed.

The jury found a verdict for the defendants. The plaintiff moved for a new trial. The motion was overruled and the judgment rendered on the verdict. * * *

WILSON, Chief Justice, delivered the opinion of the court:

The second assignment of error, which questions the correctness of the instruction of the court, raises the only point in the case that can properly be investigated; and the decision of that point disposes of the whole case. In the trial of the cause in the court below, the legality of the sale of a steamboat became a material question, and the court instructed the jury, "that in order to constitute a *bona fide* purchaser, the consideration must be paid, and not merely secured to be paid."

In one aspect of the case, this instruction must have had a decisive influence upon the determination of the jury, and in no view of it can it be regarded as correct. When the sale of an article of property is in other respects fair and legal, allowing time for the payment of the purchase money, does not vitiate, or even impugn the legality of the transaction. Sales upon time are of more frequent occurrence than cash sales, and are of equal validity. To declare otherwise would establish a new rule which would set afloat, and render doubtful and precarious the titles to a large portion of the property of the community. The objection that the plaintiff cannot contest the propriety of this instruction, because it was given as a qualification to that asked for by himself, is without even plausibility. A party is not precluded from objecting to an erroneous instruction which operates against him,

merely because it is given in connection with one which he may have prayed for, notwithstanding that prayed for may also be illegal. When instructions are given by the court at the instance of a party, it is just and proper that he should afterwards be estopped by his own act from denying their legality; but upon no principle can he be debarred from resisting a decision which he has neither solicited nor sanctioned.

The decision of the court below is reversed, and the cause remanded for a rehearing.

Judgment reversed.

MOBILE, ETC., RY. v. JUREY.

111 U. S. 584. [*1884.*]

Mr. Justice WOODS delivered the opinion of the court.

The defendants in error, Jurey and Gillis, brought this action for the use of the Factors' & Traders' Insurance Company against the plaintiff in error, the Moblie & Montgomery Railway Company, to recover $12,000 for the failure of the latter to deliver certain cotton which had been placed in its possession as a common carrier. The complaint, which was drawn according to the form prescribed by the Code of Alabama, was as follows:

* * *

The last assignment of error which we shall notice, is based on the charge of the court, to the effect, that "the measure of damages would be the value of the cotton in New Orleans, where it was to have been delivered, together with interest on said sum at eight per cent per annum from the time when the cotton ought to have been delivered." The error alleged is, that the rate of interest should have been placed at five per cent, which is the legal rate in Louisiana, where the contract was to be performed, and not at eight per cent, which was the legal rate in Alabama, where the contract was made.

Conceding that the charge in respect to the rate of interest was erroneous, the judgment should not be reversed on account of the error. The charge contained at least two propositions, first, that the measure of damages was the value of the cotton in New Orleans, with interest from the time when the cotton should have been delivered; second, that the rate of interest should be

eight per cent. It is not disputed that the first proposition was correct. But the exception to the charge was general. It was, therefore, ineffectual. It should have pointed out to the court the precise part of the charge that was objected to. "The rule is, that the matter of exception shall be so brought to the attention of the court, before the retirement of the jury to make up their verdict, as to enable the judge to correct any error if there be any in his instructions to them." Jacobson v. The State, 55 Ala. 151.

"When an exception is reserved to a charge which contains two or more distinct or separable propositions, it is the duty of counsel to direct the attention of the court to the precise point of objection." South & North Alabama Railroad Company v. Jones, 56 Ala. 507.

So in Lincoln v. Claflin, 7 Wall. 132, this court said: "It is possible the court erred in its charge upon the subject of damages in directing the jury to add interest to the value of the goods. * * * But the error, if it be one, cannot be taken advantage of by the defendants, for they took no exception to the charge on that ground. The charge is inserted at length in the bill. * * * It embraces several distinct propositions, and a general exception cannot avail the party if any one of them is correct." On these authorities we are of opinion that the ground of error under consideration was not well saved by the bill of exceptions.

Many other grounds of error have been assigned though not argued by counsel for the plaintiff in error. But what we have said covers most of them. The others are not well taken. We find no error in the record.

The judgment of the Circuit Court is affirmed.

HAINES v. REPUBLIC FIRE INS. CO.

59 New Hampshire, 199. [*1879.*]

Assumpsit, on a policy of insurance. The evidence tended to show that the application was taken by one Page, who was employed by Webster, Morril & Co., the defendants' agents, to solicit insurance for them, and give them information as to proposed risks, and that he received a commission on the premiums

on policies issued on risks obtained by him. The defense was, that there was a fraudulent over-valuation of the property. The plaintiff claimed that Page was the defendants' agent, and that they were bound by his knowledge of the condition of the property.

On this branch of the case, the court instructed the jury as to the duties of agents and how far their acts were binding on the company, and called their attention to the provisions of Gen. St., Chap. 159, and stated to the jury that there was no evidence that Page possessed the qualifications required by the statute for an agent.

The plaintiff excepted to these instructions, but did not state the ground of exception. At the time the instructions were given and the exception was taken, the plaintiff's counsel were not aware that the statute referred to by the court had been repealed, and did not take the exception on that ground.

Verdict for the defendants, and motion by the plaintiff for a new trial.

STANLEY, J. The only error in the instructions was as to the qualifications of agents; but this is not now open to the plaintiff. The exception was general. The point now taken was not known to or relied on by the counsel at the time the exception was taken. Exceptions must stand on the ground on which the party taking them intended they should stand when they were taken. But if, when taken, it was intended to rely on this point, it could not now avail the plaintiff, for the attention of the court was not called to the point now relied on. When an exception is taken to instructions which are erroneous, upon a point which, if made known at the time, would have been rectified, the point must be stated, so that the court can understand the ground of objection, and have an opportunity to correct the error. If not stated, the exception will be regarded as waived. It would be unjust to allow a party to lie by and take the chances of a verdict in his favor, and, if defeated, avail himself on an exception which might have been obviated if seasonably known. Moore v. Ross, 11 N. H. 547, 557; McConihe v. Sawyer, 12 N. H. 396; Whipple v. Stevens, 22 N. H. 219; Hayward v. Bath, 38 N. H. 179; Heath v. Heath, 58 N. H. 292; Ford v. Monroe, 20 Wend. 210.

Exception overruled.[1]

[1] The rule is less strict in most jurisdictions when the error is one of law, rather than the method of formulating the instructions.—ED.

HINDMAN v. FIRST NAT. BANK.

112 Federal Reporter, 931. [*C. C. A. 1902.*]

LURTON, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

The plaintiff in error has presented no less than 182 assignments of error, an unnecessarily prodigious number. No less than 41 of these are errors assigned upon the charge of the court. These are all based upon eight exceptions taken to the charge. Objection is made that these exceptions are too general; that each is an exception covering several distinct propositions; and that, if any proposition be good, the whole exception must fail. Johnson v. Garber, 19 C. C. A. 556, 73 Fed. 523. An exception to a charge should be taken before the jury retire. It should be sufficiently definite to call the judge's attention to the particular matter objected to, in order that he may have an opportunity to correct it. Neither should an exception cover two distinct propositions, for such an exception is insufficient if either one should prove correct. Railroad Co. v. Jurey, 111 U. S. 596, 4 Sup. Ct. 566, 28 L. Ed. 527; Bogk v. Gassert, 149 U. S. 25, 13 Sup. Ct. 738, 37 L. Ed. 631; Holloway v. Dunham, 170 U. S. 619, 18 Sup. Ct. 784, 42 L. Ed. 1165; Felton v. Newport, 34 C. C. A. 470, 92 Fed. 470. This objection must be regarded as fatal to most of the exceptions, taken to the charge as delivered, though there is one objection which may fairly be regarded as sufficiently definite to base assignments of error upon. That exception is in these words: "We desire to also except to the court's measure of damages in this case." What the court had said on this subject was this:

"If the jury should conclude that the plaintiff is entitled to recover anything, then the measure of the plaintiff's damages would be the difference between the value of the eighty shares of stock on the 31st day of December, 1892, and its value of February 6, 1893, when the plaintiff bought it. Interest may be allowed on this, if the jury see fit. For any depreciation which may have resulted after the latter date the defendants would not be responsible, inasmuch as that depreciation may have been the result of causes with which the defendants had no connection."

This paragraph was followed by some observations upon parts of the evidence, intended as an application of the proposition

of law quoted, which did not involve the statement of any new or distinct proposition. This exception has been criticised, but we think the trial judge could not have misapprehended the scope of the exception, and that the charge on this subject of damages may be regarded as constituting a single subject. In dealing with an objection to an exception this court, in Felton v. Newport, 34 C. C. A. 470, 92 Fed. 470, speaking by Circuit Judge SEVERENS, said:

"The charge upon this subject was entire, and bound up in a single proposition. If it was erroneous in any substantial particular, it would seem that the exception would reach the error, especially when it pervades the whole instruction given upon the subject."[1]

The instruction limited the plaintiff to a recovery of the difference between the value of the shares on December 31, 1892, the day the company was licensed to do business, and February 6, 1893, the date when plaintiff bought his share; in others words, if the shares of the company were worth as much on February 6, 1893, as they had been on December 31, 1892, the plaintiff had sustained no loss, although at both dates the shares may have been much less intrinsic value than the price paid for them. This instruction was erroneous, and must result in a reversal and a new trial. * * *

SECTION 8. VERDICTS.

(a) *Return and Entry.*

SAUNDERS v. FREEMAN.[1]

Moore, 33. [*1561.*]

Trinity, 3, Elizabeth. In a *quid juris clamat*,[2] the tenant said that he held in tail under the grant of A. The plaintiff said

[1] In many of the western states a general exception to a particular written instruction is sufficient to raise any and all questions. Doud v. Reid, 53 Mo. App. 553; Ry. v. Young, 30 Colo. 349. Compare Smith v. Ry., 74 N. J. L. 452. It has also been held that it is not necessary to object to the giving of an instruction in order to found an exception thereon. Harding v. Ry., 232 Mo. 444.

[1] This case is anonymous in Moore, but a part of what is evidently the same case is reported in Dyer, 217, under the name of Saunders v. Freeman.

[2] For this writ, see Jacobs' Law

that A did not grant: Upon which they were at issue, and the *nisi prius* issued to the county of North—, where, before Dyer and Benlow, the inquest was charged upon the said issue; the jurors left the bar, and, after the rising of the court, they returned before the justices and gave a verdict privately for the defendant, and had leave to eat and drink. Afterwards, on the next day, when the court was sitting, they returned and gave their verdict properly, and found for the plaintiff; and all this matter was entered on the *postea*.

And on a day in *banc*, the question was for which of these parties the judgment should be given. The opinion of all the justices was that the judgment should be given for the plaintiff, because the last verdict which was rendered openly in court is the verdict in fact and not the first, since on a privy verdict before the justices none of the parties are called; and if one of the jurors die in the interim between the first verdict rendered and the second, or if the judge die, the verdict taken before is void. And yet neither the one nor the other after verdict rendered would prevent judgment being given.

And also, if the jurors will not say anything the next day, the acceptance of the first verdict will be to no purpose, for the rendering of this verdict is allowed solely for the relief of the jury.

And it was said by Dyer that the eating and drinking before the second verdict would not make it void, because it was done by leave of the justices, and also at their own expense; and though the jurors eat and drink before rendering their verdict, this will not avoid it, if not done at the cost of one of the parties.[3] If it is at the cost of the jurors themselves it is not material, as was lately adjudged in the case of one Palskin of Cornwall.

LAWRENCE v. STEARNS.

11 Pickering (Mass.), 501. [*1831.*]

The jury in this case returned specially their doings, which appear in the following certificate signed by the foreman:

Dictionary, title, Quid juris clamat, and Fitzherbert, N. B. 345 A.

[3] For a modern case of treating the jury, see Sandstrom v. Oregon &c. Nav. Co., 136 Pac. 878, 49 L. R. A. (N. S.) 889, annotated.

"The jury, after receiving instructions from the court, retired to their room, and after much consultation, agreed upon a verdict at about 9 o'clock in the evening, at which time the court had adjourned until the following morning; which verdict was as follows:—That the defendant is guilty in manner and form as the plaintiff has declared against him;—which verdict was not reduced to writing, but it was agreed that it should be done in the morning; and after such verdict was agreed upon, the officer in attendance upon the jury was informed that they had agreed, and he permitted the jurors to separate. The jury again met in their room the following morning to bring in their verdict, when one of their fellows refused to concur therein. Much consultation was had, but after the refusal of said juror, the jury were unable again to agree."

The dissenting juror stated to the court, that the jury, before their separation, had agreed upon a verdict for the plaintiff, and that he himself then concurred therein; but that after their separation he had more maturely considered the whole subject, and could not conscientiously assent to the verdict. Whereupon the plaintiff moved that judgment should be entered upon the verdict; to which the defendant objected; and thereupon the cause was continued, in order that the motion might be submitted to the determination of the whole court.

SHAW, C. J., afterwards drew up the opinion of the court. The only verdict which can be received and regarded, as a complete and valid verdict of a jury, upon which a judgment can be rendered, is an open and public verdict, given in and assented to, in open court, as the unanimous act of the jury, and affirmed and entered of record, in the presence and under the sanction of the court. 3 Bl. Comm. 377; Root v. Sherwood, 6 Johns. R. 68. A convenient practice has been adopted in this country, authorizing the jury, when they agree during the adjournment of the court, to seal up their verdict and separate, and come in and affirm it at the next opening of the court. But in such case, the verdict is to be affirmed in open court, as the unanimous act of the jury, and in presence of the whole panel, so that each juror has an opportunity to express his dissent to the court, in case his decision has been mistaken or misrepresented by the foreman or his fellows, or in case he has been forced into acquiescence by improper means. Such an affirmation is the only evidence the court can receive of the free and unanimous assent of the jury

to the verdict. It follows, therefore, that if any one juror shall then express his dissent, and persist in it, the verdict cannot be recorded. If indeed the jury by collusion should declare themselves agreed, when they are not, in order to induce the officer to permit them to separate, or if one juror should declare his assent, with an intent afterwards to dissent in court, it would undoubtedly be a great misdemeanor and render the party liable to summary punishment. And if, after a jury has so agreed and before the verdict is affirmed, whilst it may still be considered as resting in the breast of the jury, and any one, especially a party interested, should enter into discussions with a juror and endeavor to influence his opinion and to induce him to dissent from the verdict before agreed to, it must be considered as a great breach of propriety and of duty, both in the party who attempts such practice, and in the juror who permits it.

In this case there was no verdict which the court can recognize, and the motion must be overruled.[1]

ROOT v. SHERWOOD.

6 Johnson (N. Y.) 68. [*1810.*]

This was an action for a libel. The cause was tried at the Delaware circuit, in September, 1809, before Mr. Justice THOMPSON.

The trial lasted till late in the evening, and after the charge of the judge, the parties consented that the jury might seal up their verdict. At the opening of the court, on the next day, the jury appeared, and the foreman delivered the sealed verdict, which was opened and read, by which the jury found for the plaintiff for $150 damages. On being polled, nine of the jurors dissented from the verdict; but, at the same time, stated that they did agree to the verdict when it was made, and so informed the constable before they separated. The judge directed the verdict to be entered, subject to the opinion of the court, on the question, whether the same ought to be recorded.

[1] The rule requiring a unanimous verdict has been changed by constitutional amendment in a number of the states. See Mo. Const. Art. II, § 28.

Per CURIAM. The jury, when they came to the bar to deliver in their verdict, had a right to dissent from the verdict to which they had previously agreed. There is no verdict of any force but a public verdict, given openly in court; until it was received and recorded, it was no verdict, and the jury had a right to alter it as they may a private verdict. The previous agreement, that the jury might seal up their verdict, did not take away from the parties the right to a public verdict, duly delivered. There being, then, no legal verdict in this case, a new trial must be awarded, with costs to abide the event of the suit.

New trial granted.

BLACK v. THORNTON.

31 Georgia, 641. [*1860.*]

Trover for the conversion of certain slaves; pleas, not guilty and the statute of limitations. * * *

The jury came into court with a verdict "for the defendant."

Before the verdict was received and entered as such, counsel for plaintiffs moved the court to poll the jury, which motion the court granted, and the jury were polled.

When the tenth juror was called, and asked the question: "How do you find for the plaintiffs or for the defendant?" he answered, "I am not fully satisfied, but I could find no other verdict with the lights before me." The juror was again asked the question, and answered as follows: "I don't know that I can answer that question."

The presiding judge then said to the jury: "The verdict not appearing to be unanimous, you must retire, gentlemen, and bring in a unanimous verdict. I trust, gentlemen, that you will not consider that either the court or the counsel have detained you thus long, on a matter in which you have no interest, merely to harass you. We are all doing merely our duty which the law compels us to perform. It is my duty to receive no verdict that is not unanimous; and Mr. Harman having answered to the question, 'How do you find, for the plaintiffs or for the defendant?' 'that he don't know that he can answer the question,' neither agrees or disagrees to the verdict. The law, though, requires that he agree to it, and he not agreeing, you have nothing to do

but to retire to your room, and let him, and others that agree with him, convince you that you are wrong. You must discuss and deliberate. For that purpose you are sent out. Retire, gentlemen, and make up your verdict."

The jury returned the same verdict as before, and at the request of plaintiffs' counsel the jury was again polled.

Counsel for plaintiffs requested the court in polling the jury to ask each juror whether the verdict was his verdict, and had the approbation of his judgment, which request the court refused.

Counsel for plaintiff also requested the court to require each juror to answer for himself, and without reference to what any of his fellows may have answered before him, and to request any juror, who shall say anything about being fully satisfied, to state whether he is fully satisfied with the verdict now. This request was refused by the court.

In polling the jury the second time, the same form of question was adopted as at first, in answer to which, seven of the jurors said: "for the defendant," one said "I find for the defendant, but am not fully satisfied with the evidence before us;" one said, "I am not fully satisfied, but with the lights before me, I can find no other verdict but for the defendant;" one said, "I am not fully satisfied that I am right, but I find for the defendant;" one said, "I did not understand you before, I am not fully satisfied, but I find for the defendant;" and one said, "I am not fully satisfied, but with the testimony we had before us, I find for the defendant."

The verdict was then received and entered as the unanimous verdict of the jury.

Counsel for plaintiffs then moved for a new trial of said case on the following grounds:

1st. Because the verdict was not the unanimous verdict of the jury.

2d. Because five of the jurors, when polled, in effect, denied that the verdict was their verdict, and their answers show that the said verdict did not receive the approbation of their judgment.

3d. Because the court erred in refusing to poll the jury according to the form of question and requirement, requested by counsel for the plaintiffs as hereinbefore stated.

4th. Because the court erred in the remarks and instructions which he made and gave to the jury in sending them back to

their room after the first polling, and also erred in giving them any instruction at all at that time.

5th. Because the court erred in allowing the verdict to be entered on the minutes. * * *

JENKINS, J., delivering the opinion of the court: * * *

When the verdict was returned and read, plaintiffs' counsel asked that the jury be polled, and this was done. One of the jury answering that he could not say, whether he found for plaintiffs or defendant, the court declined to receive the verdict, and remanded them to their room.

They came a second time into court with the same verdict, and were again polled. Exception is taken to the manner in which the question was propounded to each juror, viz.: "Do you find for the plaintiffs or the defendant?" The better form of question would be, (following the reading of the verdict), "What say you, Mr. Juror, is that, or is it not your verdict?" But as there is no complaint in this case, which does not go to the whole verdict, we think the question, as put, equivalent, and therefore overrule the exception.

8th. But it is further excepted that the motion for a new trial should have been sustained, and the verdict set aside, on the ground that the answers made on the polling of the jury, show that the verdict was not unanimous.

The greater number of the jury answered simply that they found for the defendant.

Some four or five added, either "that they were not satisfied," or "that they were not fully satisfied," or said, "that they were not satisfied, but with the lights before them, they found for the defendant."

They all, however, did say that "they found for the defendant," which was the verdict read in the court. Is it requisite that to sustain a verdict, that a juror should be wholly free from doubt, should be "fully satisfied with it?" If so, what shall become of the cases turning upon a preponderance of evidence? Where the preponderance is not great, shall freedom from doubt be exacted? Are such cases never to be decided?

In this case the jury pursued the course proper in the absence of clear and satisfactory evidence; they left the parties as they found them; they conformed to the ancient maxim of the law, "*portior est conditio defendentis.*" The verdict was properly received and recorded. * * *

RIGG v. COOK.

9 Illinois, 336. [*1847.*]

TREAT, J. This was an action of ejectment, commenced in the St. Clair Circuit Court, on the 23d of October, 1845, by John Cook against Rachel Rigg, for the recovery of the southeast fractional quarter of section twenty-three, and the north fractional half of section twenty-six, in township one, north of range eight west, containing three hundred and thirty-nine acres, and eighty-five hundredths of an acre. * * *

Before the jury retired, it was agreed by counsel, that the jury might seal up their verdict and separate, and that the verdict might afterwards be reduced to proper form. The jury accordingly made up a sealed verdict as follows: "We, the jury, find the defendant guilty," which was opened the next morning at ten o'clock; and at two o'clock of the same day, it was reduced to form by the plaintiff's counsel, to which the defendant made no objection, but asked that the jury, which had not then been discharged for the term, might be polled; which request the court denied, and the defendant excepted. The verdict, as finally entered, finds the defendant guilty of withholding the possession of the land in question from the plaintiff, who is entitled to an estate in fee therein; except as to the part claimed by Brown, Johnson, and Pulliam, as stated in the evidence, of which part the defendant is not guilty. The court overruled a motion for a new trial, and rendered judgment on the verdict. The defendant prosecuted an appeal to this court. * * *

There was no error in the instructions of the court. The law of the case was fairly and correctly stated to the jury.

A party has the right to have the jury polled on the receipt of the verdict, and a denial of the right is error.[1] Johnson v. Howe, 2 Gilm. 842. It makes no difference whether the verdict is brought in sealed, or delivered *ore tenus* by the foreman. Fox v. Smith, 3 Cowen, 23; Jackson v. Hawks, 2 Wend. 619. A direction to the jury to seal up their verdict and separate, does not dispense with their personal attendance in court, when the verdict is opened; and if any of them dissent, the verdict cannot be

[1] It is held in several states that a poll of the jury cannot be demanded as a matter of right, but rests in the sound discretion of the trial judge. See Blum v. Pate, 20 Cal. 69.

received. Root v. Sherwood, 6 Johns. 68; Lawrence v. Stearns, 11 Pick. 501. After a verdict is received and the jury discharged, the control of the jury over the case is at an end, and they cannot be recalled to alter or amend the verdict. Seargent v. The State, 11 Ohio, 472. When the verdict was opened in the present case, the appellant might have insisted on her right to have the jurors severally asked if it was their verdict; but omitting to exercise the right then, she was precluded from doing it afterwards. As we understand the bill of exceptions, the verdict was received by the court in the presence of the jury; and the jury were then discharged from the case, with an existing stipulation of counsel, that the verdict might afterwards be reduced to form and entered of record. The right of the appellant to have the jury polled was gone, for the reason that the control of the jury over their verdict had ceased. She had still the right to insist that the real finding of the jury should be pursued in putting the verdict into form. No objection on this score was taken, and could not with any show of propriety have been; for while the verdict, as returned by the jury, was for the whole of the premises claimed, the verdict as finally entered was but for a part of the premises. This modification was not to her prejudice.

The judgment of the Circuit Court is affirmed, with the costs of this appeal.

Judgment affirmed.

KOON v. INSURANCE CO.

104 U. S. 106. [*1881.*]

Error to the Circuit Court of the United States for the Northern District of Illinois.

This is an action of debt brought by the Phoenix Mutual Life Insurance Company against Henry H. Koon as principal, and the other defendants as sureties, on a bond in the penal sum of $10,000, conditioned for the faithful performance of his duties as agent of the company. The defendants pleaded *nil debit.*

It appears from the bill of exceptions that upon the retirement of the jury "it was agreed by the parties that the jury might, when they had agreed upon their verdict, if the court

should not then be in session, sign and seal the same, and deliver the same to the officer in charge and disperse."

The jury, having agreed upon their verdict when the court was not in session, signed, sealed, and delivered it to the officer in charge, who returned it into court, where it was ordered to be opened and read. It was in the following words and figures, to wit: "We, the jury, find for the plaintiffs, and fix the sum due on the bond at $7500, and damages at one cent." The envelope in which it was enclosed also contained another paper, on which was the following writing: "The undersigned jury signed the enclosed verdict as a compromise, being the largest amount we can get;" signed by five of the jurors.

Thereupon the court directed the clerk to put the verdict in the following form: "We, the jury, find the issue for the plaintiff, and find the debt ten thousand dollars, and assess the damages at seven thousand five hundred dollars; the said debt to be discharged on payment of said damages."

To which action, in ordering the verdict to be opened and read in the absence of the jury and in changing its form, the defendants excepted, and moved the court to correct the entry so as to make it conform to the verdict as returned. The motion was overruled, and judgment rendered on the verdict as recorded. The defendants sued out this writ of error.

Mr. Chief Justice WAITE delivered the opinion of the court.

The stipulation "that the jury might, when they had agreed on their verdict, if the court should not then be in session, sign and seal the same, and deliver the same to the officer in charge and disperse," was equivalent to an agreement by both parties, on the retirement of the jury, that the court might, when the sealed verdict was handed in by the officer, open it in the absence of the jury and reduce it to proper form, if necessary. The stipulation was also a waiver of the right to poll the jury if they should not be in court.[1]

The issue to be tried was on a plea of *nil debit*. This admitted the execution of the bond, and required the jury only to find the

[1] SAVAGE, Ch. J., in Jackson v. Hawks, 2 Wend. 619: "It is the undoubted right of a party to poll a jury on their bringing in their verdict, and he cannot be deprived of it, but by his express assent. Notwithstand the practice of the judge, the counsel for the defendant positively states that there was no agreement waiving the right, and that he would not have consented to a sealed verdict had he supposed

amount due. If anything was found to be due, the law fixed the form of the verdict and judgment. The jury found there was $7500 due on the debt and one cent damages for the detention. That finding, reduced to proper form, was in favor of the plaintiff for the penalty of the bond, to be discharged on payment of $7500. All the court did was to enter the verdict in that form. In doing so it only gave legal effect to what the jury unmistakably found. This was allowable, both under section 954 of the Revised Statutes and the Practice Act of Illinois.

Judgment affirmed.

HUMPHRIES v. DISTRICT OF COLUMBIA.

174 U. S. 190. [*1898.*]

This case is before the court on error to the Court of Appeals of the District of Columbia. The facts are these: On May 22, 1896, the plaintiff in error filed an amended declaration in the Supreme Court of the District, claiming damages from the defendant, now defendant in error, on account of injuries caused by a defective condition of the bridge between Washington and Anacostia—a condition resulting from the negligence of the defendant. A jury was empaneled, trial had, and the case submitted to it on November 30, with instruction to return a sealed verdict. The instructions and the verdict were returned on the morning of December 1, and were in the following form:

"When the jury agree upon a verdict, write it out, all of the jurors sign it, date it, seal it up and deliver to the foreman, to be delivered in open court on the 1st day of December, 1896, and in the presence of all who sign it.

Elizabeth M. Humphries

v. No. 38281. At Law.

The District of Columbia.

Dated November 30, 1896.

"We, the jurors sworn to try the issue joined in the above-entitled cause, find said issue in favor of the plaintiff, and that

that he thereby would lose the right of polling the jury. The party, therefore, not having expressly assented, and having been deprived of a right to which he was entitled, the verdict must be set aside; costs to abide the event."

See also Bishop v. Mogler, 33 Kan. 145.

the money payable to him by the defendant is the sum of seven thousand dollars and — cents ($7000.00).

All sign:

Michael Keegan, etc.

[Names omitted.]

The proceedings on December 1 are thus stated in the record:

"Come here again the parties aforesaid in manner aforesaid, and the same jury return into court, except John T. Wright, who does not appear, and having said sealed verdict in his possession as foreman sends the same to the court by Dr. McWilliams, who delivers the same to the court with the statement that the said John T. Wright is ill and confined to his bed and physically unable to appear in court; that he, said McWilliams, is his attending physician, and as such received from said Wright said sealed verdict with direction to deliver it to the court; whereupon the defendant, by its counsel, objected to the reception, opening and reading of said sealed verdict; whereupon, in answer to the questions of the court, the remaining jurors severally on their oath say that they severally signed said verdict, and that they saw said John T. Wright sign the same, and that the name 'John T. Wright,' signed thereto, is in his handwriting; 'thereupon the remaining jurors on their oath say they find said issue in favor of the plaintiff and assess her damages by reason of the premises at seven thousand dollars ($7000).'

"The counsel for the defendant ask that the jury be polled, which is done, and each of said remaining jurors on his oath says that he finds said issue in favor of the plaintiff and assess her damages by reason of the premises at $7000."

Upon this verdict a judgment was entered. Proceedings in error were taken, but were dismissed by the Court of Appeals on account of a failure to have the bill of exceptions prepared in time. Thereafter, and at a succeeding term, the defendant filed a motion to vacate the judgment on the ground that there was no valid verdict, which motion was overruled. On appeal to the Court of Appeals this decision was reversed and the case remanded, with instructions to vacate the judgment, to set aside the verdict and award a new trial. 12 App. D. C. 122. This ruling was based on the proposition that the verdict was an absolute nullity, and therefore the judgment resting upon it void, and one which could be set aside at any subsequent term.

Mr. Justice BREWER, after stating the case, delivered the opinion of the court.

The single question presented by the record, the right to review which is sustained by Phillips v. Negley, 117 U. S. 665, is whether the verdict, returned under the circumstances described, was an absolute nullity, or, at least, so far defective that no valid judgment could be entered upon it. Such is the contention of the defendant. On the contrary, the plaintiff insists that whatever irregularities may have occurred, or be apparent in the proceedings, they are simply matters of error, to be corrected on direct proceedings within the ordinary time, and in the customary manner for correcting errors occurring on a trial. Is the defect or irregularity disclosed a mere matter of error or one which affects the jurisdiction? The opinion of the Court of Appeals, announced by Mr. Justice MORRIS, is an exhaustive and able discussion of the question, arriving at the conclusion that the verdict was an absolute nullity, and therefore the judgment, based upon it, one that could be set aside, not merely at the term at which it was rendered, but at any subsequent term.

While appreciating fully the strength of the argument made by the learned judge, we are unable to concur in the conclusions reached. That the verdict returned expressed at the time it was signed the deliberate judgment of the twelve jurors, cannot be questioned. That it remained the judgment of the eleven at the time it was opened and read is shown by the poll that was taken, and that it was still the judgment of the absent juror at the time he forwarded it to the court is evident from the testimony. So the objection runs to the fact that at the time the verdict was opened and read each of the twelve jurors was not polled, and each did not then and there assent to the verdict as declared. That generally the right to poll a jury exists may be conceded. Its object is to ascertain for a certainty that each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent. It is not a matter which is vital, is frequently not required by litigants; and while it is an undoubted right of either, it is not that which must be found in the proceedings in order to make a valid verdict. Take the case suggested on argument. Supposing the twelve jurors are present, and the defeated party insists upon a poll of the jury and that right is denied, can it be that a verdict returned in the presence of the twelve by

the foreman, without dissent, is by reason of such denial an absolute nullity? Is not the denial mere error, and not that which goes to the question of jurisdiction? There are many rights belonging to litigants—rights which a court may not properly deny, and yet which if denied do not oust the jurisdiction or render the proceedings absolutely null and void.

The line of demarcation between those rulings which are simply erroneous and those which vitiate the result may not always be perfectly clear, and yet that such demarcation exists is conceded. This ruling of the trial court, conceding it to be error, is on the hither side of this line, and could only be taken advantage of by proceedings in error. It is not so vital as to make the verdict a nullity or the judgment entered thereon void. Suppose, after the jury, at the end of a protracted trial, have agreed upon the verdict and come into court to announce it, and after it has been read in open court but before a poll can be had one of the jurors is suddenly stricken dead, can it be that the whole proceeding theretofore had become thereby a nullity? Can it be that after each of the jurors has signed the verdict and after it has been returned and each is present ready to respond to a poll, the mere inability to complete the poll and make a personal appeal to each renders the entire proceedings of the trial void? We are unable to assent to such a conclusion. The right to poll a jury is certainly no more sacred than the right to have a jury, and under many statutes a trial of a case, in which a jury is a matter of right, without a waiver thereof, has again and again been held to be erroneous and subject to correction by proceedings in error. But it is also held that an omission from the record of any such waiver is not fatal to the judgment.

"The fourth alleged error is to the effect that the judgment in the Kansas court was void because the case was tried by the court without the waiver of a trial by jury entered upon the journal. Whatever might be the effect of this omission in a proceeding to obtain a reversal or vacation of the judgment, it is very certain that it does not render the judgment void. At most it is only error, and cannot be taken advantage of collaterally." Maxwell v. Stewart, 21 Wall. 71. "A trial by the court, without the waiver of a jury, is at most only error." Same case, 22 Wall. 77.

If a trial without a jury, when a jury is a matter of right and no waiver appears of record, is not fatal to the judgment, *a*

fortiori the minor matter of failing to poll the jury when it is clear that the verdict has received the assent of all the jurors, cannot be adjudged a nullity, but must be regarded as simply an error, to be corrected solely by direct proceedings in review. See in reference to the distinction between matters of error and those which go to the jurisdiction, the following cases: *Ex parte* Bigelow, 113 U. S. 328; *In re* Coy, 127 U. S. 731; *In re* Belt, 159 U. S. 95; *In re* Eckart, 166 U. S. 481.

We are of opinion that the defect complained of was merely a matter of error, and does not render the verdict a nullity.

The judgment of the Court of Appeals will therefore be reversed and the case remanded with instructions to affirm the judgment of the Supreme Court of the District of Columbia.

DOUGLASS v. TOUSEY.

2 Wendell (N. Y.), 352. [*1829.*]

MARCY, J. * * * 2. The defendant also asks to have the verdict set aside, on the ground of irregularity. It was late in the evening when the cause was committed to the jury. The judge, without the express consent of the counsel, directed them to seal up their verdict and bring it into court the next morning. They presented their sealed verdict, according to the direction of the court; and when polled, one of them refused to agree to it. When asked why he signed the verdict, he said he was unwell and unable to sit up all night. The judge sent the jury out again, and they finally brought in the same verdict which they had signed and sealed the evening previous. The juror who had dissented from the sealed verdict stated to the court that he had received such explanation of the testimony from his fellows that he was satisfied with the verdict. The ancient strictness in regard to the conduct of jurors has of late years been somewhat relaxed. In the case of The People v. Douglass (4 Cowen, 26), it is said by the chief justice, that "In a civil suit at this day, it is perfectly clear that the separation of the jury without, and even contrary to the direction of the court, would not, of itself, warrant the court in setting aside their verdict." Where there is no evidence or suspicion of abuse while the jury

are separated, their verdict will not be disturbed. (1 Cowen, 221; 5 id. 283.)

In the case of Bunn v. Hoyt, 3 Johns R. 255, a question arose very similar to that now before the court. The jury retired, deliberated several hours, sealed their verdict, separated, and the next morning brought it into court. On being polled, one of them disagreed to it. The judge (Ch. J. KENT) sent them out again, and the disagreeing juror ultimately assented to the verdict, which had first been brought in under seal. It is not stated in the case of Bunn v. Hoyt, that the bringing in a sealed verdict was by the direction of the judge, or by the acquiescence of the counsel for the parties, but it probably was so. In this case, the trial closed at a late hour at night, and the judge directed the jury to seal their verdict, and gave them permission to separate. There being no objections to this course on the part of the defendant, he must be deemed to have tacitly assented to it. The verdict cannot, therefore, be set aside for the alleged irregularity in receiving it.[1]

JACKSON v. WILLIAMSON.

2 Durnford & East, 281. [*1788.*]

A rule had been obtained by Lambe to show cause why the *postea* in this cause should not be amended, by inserting the sum of £61 instead of £30 agreeable to the real finding of the jury. It was an action of trespass against the sheriff of Durham for having unjustly sold a coal keel or lighter. It was proved at the trial that the sheriff had actually sold this for £31, but several of the witnesses on the part of the plaintiff proved it to have been worth £60; the jury gave their verdict for £30 damages, and now the plaintiff produced an affidavit made by all the jurymen, saying that they meant to give the £30 as damages for the seizing and detaining the vessel, over and above the £31 for which it appeared that the vessel had been actually sold; and that they conceived that the prothonotary would of course add the £30 to the £31 and thereby make the whole sum of £61 which the jury intended to give.

[1] Accord, Devereux v. Cotton Press Co., 14 S. C. 396. Contra, Kramer v. Kiste, 187 Pa. 227, giving reasons why the jury should be discharged from further consideration of the case.

Chambre showed cause, and contended that it would be a very dangerous practice, if the court were to give way to such an application in any instance. If there is any ambiguity in a verdict, it ought to be inquired into and explained at the time. The verdict in this case was conceived in very plain terms; and though perhaps the jury ought to have given the £31, yet the difference is too trifling to be attended to.

Law and Lambe, *contra,* said it was entirely owing to the accident of the plaintiff's counsel happening to be out of court, when the verdict was delivered, that the mistake was not corrected at the time, but it was so the very first opportunity afterwards. Here the mistake spoke for itself. It was impossible the jury could intend to give less than what it appeared the sheriff had actually received into his hands by the sale. The seizure of the vessel, which was without any color, had been a great detriment to the plaintiff, who would not only be put to a considerable expense in procuring another, but had lost the intermediate profits; and as the jury had unanimously concurred in the explanation of their verdict, they conceived that no inconveniences need be apprehended from acceding to it in such a case as this.

The court refused the application, saying that it would introduce a very dangerous practice if they were to admit such an affidavit as the one offered. They said that they laid no stress upon its being made by all the jury: if it could be made at all, upon the same principle it might as well be made by some. If any doubt had arisen as to the meaning of the jury, if they had found a sum inadequate to the value proved, the proper time for requiring an explanation was at the trial. It was too late now; such a practice would be productive of infinite mischief; and it was better that the present plaintiff should suffer an inconvenience, than that such a rule should be introduced.

Rule discharged.[1]

CAPEN v. INHABITANTS OF STOUGHTON.

16 Gray, 364. [*1860.*]

Petition entered at April term, 1858, of the Court of Common Pleas in Norfolk, setting forth that in November, 1856, a town

[1] Accord, Walters v. Junkins, 14 Sergt & Rawle, 414.

way was laid out over the land of the petitioners in Stoughton, and damages assessed therefor, by which the petitioners were aggrieved, and the county commissioners, upon their application and after due notice, issued a warrant for a reassessment of the damages by a jury; that a jury was impaneled and the case tried before them; that blank forms of verdict for the petitioners and for the respondents were handed to them by the sheriff; that the jury agreed upon and filled out a verdict for the petitioners, but through mistake omitted to sign it, and signed a verdict for the respondents; that both verdicts were sealed up in one envelope and returned into the Court of Common Pleas; that the petitioners received information from some of the jurors that the verdict returned was in their favor, and so told their counsel, and he, relying on this information, without inspecting the verdict, moved the court at December term, 1857, to accept it, and it was accepted and ordered to be certified to the county commissioners. The prayer of the petition was that this judgment should be vacated, the case brought forward on the docket, and leave given the petitioners to sue out a writ of review.

* * *

A hearing was had in the Court of Common Pleas at April term, 1859, at which AIKEN, J., against the objection of the respondents, allowed three of the persons who had composed the sheriff's jury to testify that, after agreeing on a verdict for the petitioners and filling up a blank form accordingly, the jury by mistake signed the form of verdict for the respondents; and ordered the former case to be brought forward on the docket, and the acceptance of the verdict to be vacated as prayed for. The respondents alleged exceptions to the admission of the testimony of the jurors.

BIGELOW, C. J. We think this case differs essentially from those cited by the counsel for the respondents, in which it has been held, that the testimony of jurors is inadmissible in support of a motion to set aside a verdict on the ground of mistake, irregularity or misconduct of the jury, or of some one or more of the panel. It has been settled upon sound considerations of public policy that mistake of the testimony, misapprehension of the law, error in computation, irregular or illegal methods of arriving at damages, unsound reasons or improper motives, misconduct during the trial or in the jury room, cannot be shown by the evidence of the jurors themselves, as the ground of dis-

turbing a verdict, duly rendered. Chadbourn v. Franklin, 5 Gray, 315, and cases there cited. One of the strongest cases on this point in the English books is Bridgewood v. Wynn, 1 Har. & Wol. 574. In all those cases, however, it will be found upon examination that an inquiry was attempted into the conduct of jurors during the progress of the trial, or while they were engaged in their deliberations upon the case, or in making up the verdict to which they finally agreed. But in the present case the mistake which is proved by the testimony of the jurors is of a different character. It is not one connected with the consultations of the jury, or the mode in which the verdicts were arrived at or made up. No fact or circumstance is offered to be proved, which occurred prior to the determination of the case by the jury and their final agreement on the verdict which was to be rendered by them. But the evidence of the jurors is offered only to show a mistake, in the nature of a clerical error, which happened after the deliberations of the jury had ceased, and they had actually agreed on their verdict. The error consisted, not in making up their verdict on wrong principles or on a mistake of facts, but in an omission to state correctly in writing the verdict to which they had, by a due and regular course of proceeding, honestly and fairly arrived.

The case of Cogan v. Ebden, 1 Bur. 383, and 2 Keny. 24, is quite analogous to the present. There two different issues were joined as to a right of way over two separate closes. The foreman of the jury gave in the verdict as a general verdict for the defendant on both issues. The court received the affidavits of eight of the jurors, which were uncontradicted, "that it was the meaning and intention of the whole jury to find the former issue for the defendant and the latter for the plaintiff, and that this mistake was discovered by them an hour afterwards." On this evidence the court held that this "was a mistake arising from the jury's being unacquainted with business of this nature; and that it was agreeable to right and justice that the mistake should be rectified."

No considerations of public policy require that the uncontradicted testimony of jurors to establish an error of this nature should be excluded. Its admission does not in any degree infringe on the sanctity with which the law surrounds the deliberations of juries, or expose their verdicts to be set aside through improper influences, or upon grounds which might prove danger-

ous to the purity and steadiness of the administration of public justice. On the contrary, it is a case of manifest mistake, of a merely formal and clerical character, which the court ought to interfere to correct, in order to prevent the rights of the parties from being sacrificed by a blind adherence to a rule of evidence, in itself highly salutary and reasonable, but which upon principle has no application to the present case.

Order affirmed.[1]

(b) *General Verdicts.*

MAYOR OF DEVIZES v. CLARK.

3 Adolphus & Ellis, 506. [*1835.*]

Action on the case. The plaintiffs declared that they were possessed of a market, on Thursdays, at Devizes, and that it was the duty of persons who sold butcher's meat at Devizes on market days to expose it for sale on certain stalls appropriated by the plaintiffs to that purpose, paying the plaintiffs a reasonable sum, to-wit, 1s. 6d., for the use of each stall, and not to expose meat for sale on such market days in any place in Devizes other than the plaintiffs' stalls; and that the defendant, not regarding his duty, on divers market days sold butcher's meat in his own house in Devizes, and refused to pay the plaintiffs for the use of their stalls. Plea, not guilty.

On the trial before WILLIAMS, B., at the Salisbury Lent assizes, 1834, the plaintiffs proved that they were possessed of an ancient market; that, with very few exceptions, all persons selling butcher's meat on Thursdays in the town had always sold it at the plaintiffs' stalls, paying stallage for the same; and that, in 1803 and 1816, actions having been brought against certain persons for selling butcher's meat on market days at their own houses in Devizes, instead of the plaintiffs' stalls, the defendants in those actions had allowed judgment to go by default and had paid the costs. For the present defendant it was contended that the possession of an ancient market (which it was admitted the

[1] And so in Peters v. Forgarty, 55 N. J. L. 386, where the foreman made a mistake in announcing the verdict.

plaintiffs had proved) did not necessarily carry with it the right to prevent persons, who lived within the town, from selling at their own houses on market days; Mosley v. Walker (7 B. & C. 40); that a right to prevent such dealings within the town could only be established by proof of a custom to that extent; and that the evidence in the present case was insufficient to establish the custom, there appearing an instance or two in which a butcher had dealt at his own house on market days. The learned judge told the jury that, as it was still a matter of legal doubt, whether or not the right to an ancient market carried with it the right to prevent parties from selling in their own houses within the town on market days, and as the plaintiffs' right to an ancient market was admitted, he wished the jury, with a view to prevent further discussion between the parties, to find expressly,[1] if they thought the evidence warranted such a finding, whether there was any custom in Devizes to preclude the sale of butcher's meat on market days in any part of the town except on the plaintiffs' stalls. Upon this some of the jurymen entered into a conversation with the learned judge, from which it appeared that they understood the effect of his observations as to the point left to them. After retiring for a short time, they found a verdict for the plaintiffs generally. The following conversation then took place between the learned judge and the foreman: WILLIAMS, B.: "Then, gentlemen, you find that in your judgment there has been an immemorial usage for the corporation to demand and receive this stallage for meat in the market, and that there was no right on the part of individuals to sell in a house or shop out of the market." The Foreman: "That is not our verdict; our verdict is for the plaintiffs; the right to the market is acknowledged on all hands; of course, our verdict is to say that the defendant had not a right to do what he is charged with doing." WILLIAMS, B.: "Then you further find, that the defendant had no right?" The Foreman: "I would rather not add any words." In the course of the conversation, the learned judge said that an express finding might prevent further litigation, and the foreman said that the jury had been guided by the remarks of his lordship; but that they desired to add nothing to their verdict. A general verdict was then taken for the plain-

[1] In the absence of statute, the court is not bound to request special findings from the jury. Peck v. Snyder, 13 Mich. 21.

tiffs. In Easter term, 1834, MEREWETHER, Serjt., obtained a rule to show cause why the verdict should not be set aside, and a new trial had on the ground, chiefly, of uncertainty in the finding of the jury.

Lord DENMAN, C. J. The plaintiff is entitled to maintain this verdict, if it was rightly given, and there is nothing to show that it was not. It appears that the learned judge explained to the jury that the question of law, whether the mere possession of the ancient market was of itself enough to entitle the plaintiffs to a verdict, was a question attended with some doubt; but told them that they need not enter into that question now, inasmuch as there was direct evidence of the custom; and directed them to give their verdict on that evidence, if they deemed it sufficient to establish the custom. From what the jury said before they retired, it is clear that they understood him. Then they retire, and afterwards bring in a verdict for the plaintiffs. The only issue which they could so find, consistently with abstaining from any decision on the legal question, was the issue as to the fact of the custom. Then the judge, with the purpose of making further discussion unnecessary, told them that, if they found the fact more distinctly, it might prevent further litigation. A conversation takes place, in the course of which the jury say, "Of course, our verdict is to say that the defendant had not a right to do what he is charged with doing." Now, whether the defendant had the right, depended, at that stage of the proceedings, on the question as to the fact of the custom; finding the one was finding the other. It is true that the jury were called on to speak expressly as to the fact; but they had a right to refuse. It seems to me that they have merely exercised a right belonging to them, and that we should not be justified in disturbing their verdict.[2]

[2] Thayer, Preliminary Treatise on Evidence, p. 217: "The judges often compelled special verdicts. It was the old law that a jury, if it chose to run the risk of a mistake, and so of the punishment by attaint, always might find a general verdict. But the judges exerted pressure to secure special verdicts; sometimes they ordered them, and enforced the instruction by threats, by punishing the jury, and by giving a new trial. As matter of history, we know that the jury, on the whole, successfully stood out against these attempts; and that in most cases their right was acknowledged. But now it is remarkable how judges and legislatures in this country are unconsciously traveling back towards the old result of controlling the jury, by requiring spe-

CLERK v. MARTIN.

1 Salkeld, 129. [*1702.*]

A note was given by the defendant, whereby he promised to pay to the plaintiff, or order, so much money. The plaintiff brought an action on this note, and declared on the custom of merchants; and likewise laid a general *indebitatus assumpsit*, and on the general issue entire damages were given. Upon motion in arrest of judgment the court held that this is not within the custom of merchants, and, being no specialty, no action can be grounded on it. Then it was answered, that being void, no damages could be intended to be given for it. *Sed non allocatur;* for it is not a matter insensible, but insufficient in law. And judgment was arrested.[1] *Vide infra.*

Note to same case on p. 364.

Et nota the diversity there taken, that after verdict it may be intended that no damages were given for matter insensible; but it cannot be so intended for matter sensible, but insufficient in law.

cial verdicts and answers to specific questions. Logis and neatness of legal theory have always called loud, at least in recent centuries, for special verdicts, so that the true significance of ascertained facts might be ascertained and declared by the one tribunal fitted to do this finally and with authority. But considerations of policy have called louder for leaving to the jury a freer hand."

[1] LORD MANSFIELD, in Grant v. Astle, 2 Douglas, 722 (1781): "I have exceedingly lamented that ever so inconvenient and ill-founded a rule should have been established as that, where there are several counts, entire damages, and one count is bad, and the others not, this shall be fatal; upon the fictitious reasoning that the jury has assessed damages on all, although they in truth never thought of the different counts, but the verdict was so taken, from the inadvertence of counsel in the hurry of *Nisi Prius*. And, what makes this rule appear more absurd, is that it does not hold in the case of criminal prosecutions; for, when there is a general verdict of guilty, on an indictment consisting of several counts, if any one of them is good, that is held to be sufficient. But in civil cases the rule is now settled, and we have gone as far as we can, by allowing verdicts in such cases to be amended by the judge's notes. That might have been done, in this instance, in an earlier stage of the proceeding, but cannot now after judgment."

LLOYD v. MORRIS.

Willes, 443. [*1743.*]

HAYWARD moved in arrest of judgment. It was an action for words; and the jury found for the plaintiff, damages two guineas. There was but one count; and the words were "you are a pickpocket and a murderer; you stole a guinea from A; you killed his cattle, and murdered his child." He insisted that the verdict being general, and some of the words, viz., "killed his cattle," not actionable, the judgment ought to be arrested; and he compared it to the case of two counts, in one of which the words are actionable and in the other not. And he cited the case of How. v. Prinn, 2 Salk. 694, which is nothing to the purpose; and the case of Lloyd v. Pearse, Cro. Jac. 424, which was thus; action for these words, "thou art a bankrupt rogue and accounted a common knave; thou art a thief, and hast stolen my corn;" to the first words, "thou art a bankrupt rogue and accounted a common knave," the defendant pleaded not guilty; and justified the other words. Verdict for the plaintiff on both issues, 1s. damages for the first words and 39s. for the second, and costs for both; and judgment was reversed, because the first words were not actionable, the plaintiff being neither merchant nor tradesman, and the judgment being entire; for in the judgment the damages were joined though they were severed in the verdict. He cited also the case of Graves v. Blanchett, 6 Mod. 148, where there were two counts in an action for words, and a general verdict and entire damages, and judgment was arrested.

We had none of us much doubt, because this case it very different from the case of two counts, where the defendant might have been found not guilty upon one and guilty upon the other, and the case where the words are severed by the plea, for the same reason. But in this case it was necessary either to find the defendant guilty of the whole or none; and if judgment must be arrested, a man by speaking words not actionable and words actionable together will secure himself from an action, because he must be found guilty of the whole or none.

My brother ABNEY indeed thought that if the whole words which are laid in a count are not proved, yet if those which are actionable be proved it is sufficient.

But I and my brother BURNETT thought otherwise; and in this case we were all of opinion that the verdict could not be found otherwise; and we would take it that the jury only gave damages for such part of the words as were actionable, and that the judge directed them so to do.[1] However, we made a rule *nisi* in order to look into the cases, but declared that our present opinion was that the plaintiff was entitled to his judgment. And afterwards he moved, and had leave to enter up his judgment.

EDDOWES v. HOPKINS.

1 Douglas, 376. [*1780.*]

Assumpsit, tried before Lord MANSFIELD, at Guildhall, at the sittings after last Michaelmas term. The declaration contained several counts; some upon promises made by the testator, others on other promises by the defendants themselves. To the first set of counts *plene administravit* was pleaded, and the general issue to the others; and, the jury having found for the plaintiffs with £147 damage, a general verdict was entered by the officer.

At the trial the only question was whether the plaintiffs were entitled to interest on the value of goods sold by them to the testator. They were wholesale linen drapers, and the testator an American merchant, and it appeared to have been the usage of the American trade for merchants here to allow to their American correspondents twelve months credit, and then to charge them five per cent for interest, and for the tradesmen here to allow the merchant fourteen months credit, and then to charge five per cent. This was hardly disputed by the defendants, and his lordship held that though by the common law book debts do not of course carry interest, it may be payable in consequence of the usage of particular branches of trade; or of a special agreement; or, in cases of long delay under vexatious and oppressive circumstances, if a jury in their discretion shall think fit to allow it. But none of the articles for which the testator was indebted to the plaintiffs had been delivered fourteen months

[1] In such a case a new trial may be necessary where the non-actionable words have been improperly submitted to the jury. Christal v. Craig, 80 Mo. 367.

before his death, so that no interest was owning when he died, and the defendants contended that the usage did not bind the executors. Lord MANSFIELD, however, and the jury thought otherwise.

In the last term the solicitor-general obtained a rule to show cause why the judgment should not be arrested, on the ground that the verdict was general, and the counts inconsistent, and such as require different judgments to be entered, viz., judgment *de bonis testatoris* on those where the promises were laid to be by the testator, and *de bonis propriis* on the others. Some time afterwards, Baldwin, for the plaintiffs, obtained a cross rule for the defendants to show cause why the *postea* should not be amended by the judge's minutes, and a verdict entered for the plaintiffs only on the counts to which the evidence given at the trial applied, and for the defendants on the others. Both these rules came on to be argued this day.

The solicitor-general, for the defendants, insisted that if the court were to alter the *postea* they would, in fact, do what was properly and exclusively the province of the jury, for that the verdict would then be the act of the court.

Lee, for the plaintiffs, contended that this was not a new sort of application, and cited a case of Newcombe v. Green, in Strange (2 Strange, 1197), where it appeared by the judge's minutes that the jury had found for the plaintiff with £274 11s. damages, but the officer only entered a verdict with 1s. damages, and the court directed an amendment to be made according to the judge's minutes.

Lord MANSFIELD said it was impossible to believe there was such an absurdity in the law, as that a mere mistake of the officer should be without a remedy, and that neither the judge nor jury could possibly have proceeded on what there was no evidence of before them; and he mentioned a case of one Gibson who had been tried for robbing Mr. Francis, and convicted, and a mistake being discovered in the verdict, upon consultation with all the judges at his chambers, it was corrected from minutes signed by the jury, and the prisoner executed.

BULLER, Justice, said there was this distinction, that, if there was only evidence at the trial upon such of the counts as were good and consistent, a general verdict might be altered from the notes of the judge, and entered only on those counts; but that, if there was any evidence which applied to the other bad

or inconsistent counts (as, for instance, in an action for words, where some actionable words are laid, and some not actionable, and evidence given of both sets of words, and a general verdict), there the *postea* could not be amended, because it would be impossible for the judge to say on which of the counts the jury had found the damages, or how they had apportioned them. That, in such a case, the only remedy is by awarding a *venire de novo*. He mentioned an instance where Sir Fletcher Norton had moved for and obtained a *venire de novo* in a case of that sort.

The rule to arrest the judgment was discharged, and the other rule made absolute; but, on the payment of costs, including those of the motion in arrest of judgment.

McKEE v. CALVERT.

80 Missouri, 348. [*1883.*]

PHILIPS, C. This is an action for damages for an assault and battery. Verdict and judgment for plaintiff for the sum of $250. Defendant has brought the case here on appeal. Neither the motion for new trial nor in arrest are preserved in the bill of exceptions, and therefore no alleged errors committed in the progress of the trial can be considered or reviewed by this court. Collins v. Barding, 65 Mo. 496; Jefferson City v. Opel, 67 Mo. 394; Robinson v. Hood, 67 Mo. 660; State ex rel. Estes v. Gaither, 77 Mo. 304. On this record no errors are reviewable save such as are apparent in what is known as the record proper.

It is objected to the petition that it does not state facts sufficient to constitute a cause of action. It charges that on the 13th day of February, 1880, at the County of Clark, State of Missouri, with force and arms, the defendant assaulted, beat and bruised, cut and wounded the plaintiff, by reason of which he sustained damage in the sum of $1,000, for which he prayed judgment. For further cause of action it is alleged that on the day and place aforesaid the defendants did unlawfully, with their fists, sticks, knives and other sharp instruments, assault, beat and bruise and wound plaintiff, and other wrongs and injuries to plaintiff then and there did, by reason of which he

had sustained damages in the sum of $1,000, for which judgment is prayed.

The only tangible objection to the petition occurring to us is, that it is not affirmatively averred in the first count that the assault was wrongful, but it is alleged that it was "with force and arms," and this we think would be good after verdict. The second count was unquestionably sufficient. And while the petition apparently counts as if for two separate causes of action, they are manifestly for one and the same assault and battery. In such case the good count will support a general verdict for the plaintiff.[1] Brownell v. Pacific Railroad, 47 Mo. 240.

We perceive no reversible error in the record, and the judgment of the Circuit Court is therefore affirmed. All concur.

EMPSON v. GRIFFIN.

11 Adolphus & Ellis, 186. [*1839.*]

Case for slander. The first count stated, in the introductory part, that the plaintiff was an attorney, and a colloquium of and concerning the plaintiff in his said profession; and then set out certain defamatory words reflecting upon plaintiff in his character of attorney. There were six other counts, one of which, the fifth, contained no averment or colloquium concerning the plaintiff's profession, nor any reference to the introductory statement in the first count, but only set out defamatory words imputing dishonesty to the plaintiff. Plea, not guilty.

On the trial before PARK, J., at the spring assizes, 1838, at Warwick, the jury found a general verdict for the plaintiff, damages £15. Some of the words attributed to the defendant in the fifth count were proved at the trial. In the following Easter term Balguy obtained a rule *nisi* to arrest judgment, because the words in the fifth count were not actionable without reference to the profession of the plaintiff. A few days afterwards an order was obtained from PARK, J., to enter a verdict for the plaintiff on the first count, and for the defendant on all the

[1] See West v. Platt, 127 Mass. 367 (under rule of court). See also par. 78, chap. 110, Ill. R. S. 1913, applied in Bond v. Dustin, 112 U. S. 604.

others. In the same Easter term, May 1st, Mellor obtained a rule *nisi* to set aside the above order, on the ground that some of the words complained of in the fifth count were actually proved, and the jury might have been influenced by them in assessing the amount of damage. Both rules came on for argument at the sittings in *banc* after Trinity term last.

Lord DENMAN, C. J., in this vacation (November 27th) delivered the judgment of the court.

In this case we are of opinion that the order for confining the verdict to the first count was wrong, inasmuch as evidence was given at the trial applicable to the fifth count, as well as to the first; and the damages being general, it cannot be known what amount of them the jury meant to ascribe to each. That order must, therefore, be set aside.

The fifth count is clearly bad, and, according to the older decisions, judgment ought to be arrested; but in the late case of Leach v. Thomas (2 M. & W. 427) the Court of Exchequer, following the rule adopted by courts of error in Angle v. Alexander (7 Bing. 119) and Day v. Robinson (1 A. & E. 554), held that, under such circumstances, a *venire de novo* ought to be awarded. Such must be the rule in the present instance.

Rule absolute to set aside the judge's order. *Venire de novo* awarded.

HOPKINS v. ORR.

124 U. S. 510. [*1888.*]

This was an action of assumpsit, brought April 3, 1882, by Orr and Lindsley against Hopkins in a District Court of the Territory of New Mexico. The declaration contained a special count on a promissory note for $1,314.65, made by the defendant on October 1, 1881; and the common counts for the like sum due on that day for goods sold, for money lent, for money paid, and for money had and received. The plaintiffs filed with their declaration the following note. * * *

The description of the note in the special count corresponded with the note filed, except that it did not state that the note was payable with exchange and at a particular place. The defendant pleaded non assumpsit and payment. * * *

The jury returned a verdict saying that "they find for the plaintiff in sum of thirteen hundred and ninety-nine and 48/100." The court overruled motions for a new trial and in arrest of judgment, and gave judgment "that the said plaintiffs do have and recover from the said defendant, Lambert N. Hopkins, the said sum of thirteen hundred and ninety-nine and 48/100 ($1,399.48), and also the costs in their behalf laid out and expended, to be taxed, but that execution shall not issue therefor until further order of the court." * * *

Mr. Justice GRAY, after stating the case as above reported, delivered the opinion of the court.

It was not contended in either of the courts of the territory that any question of fact should have been submitted to the jury; but the contest was upon the sufficiency of the evidence and the verdict, in matter of law, to support a judgment for the plaintiffs.

Upon the testimony that the defendant admitted his indebtedness on the note given in evidence, that note, though varying from the description in the special count, was admissible under the common counts as evidence of money had and received by the defendant to the plaintiffs' use. Grant v. Vaughan, 3 Burrow, 1516; Page v. Bank of Alexandria, 7 Wheat. 35; Goodwin v. Morse, 9 Met. 278. And by the statutes of the territory the sum so admitted to be due bore interest at the rate of six per cent. Prince's Laws, Chap. 79, § 4; Comp. Stat., § 1734.

The omission of the word "dollars" in the verdict was not such a defect as to prevent the rendering of judgment according to the manifest intent of the jury, although it might have been more regular to amend the verdict before judgment. Parks v. Turner, 12 How. 39; Beall v. Territory, 1 New Mexico, 507, 519.

It was argued for the defendant that under the rule recognized in Maryland v. Baldwin, 112 U. S. 490,[1] the verdict being general on all the counts, and the evidence not supporting the special count, no judgment could be rendered on the verdict without first amending it so as to limit it to the common counts. But the

[1] FIELD, J., in Maryland v. Baldwin, 112 U. S. 490: "Upon these pleas issues were joined and tried by the court with a jury, which found a general verdict for the defendants. Judgment having been entered, the case was brought here on writ of error.

"On the trial evidence was introduced bearing upon all the issues, and if any one of the pleas was, in the opinion of the jury, sus-

technical rule of the common law in this matter has been changed by statute in many parts of the United States. Bond v. Dustin, 112 U. S. 604. In New Mexico that rule has been abrogated by the statute of the territory, by which "the Supreme Court, in appeals or writs of error, shall examine the record, and on the facts therein contained alone shall award a new trial, reverse or affirm the judgment of the District Court, or give such other judgment as to them shall seem agreeable to law." Prince's Laws, Chap. 16, § 7; Comp. Stat., § 2190. The manifest object of the statute is, not merely to restrain the Appellate Court from going outside of the record, but to enable it to render such a judgment as upon a consideration of the whole record justice may appear to require.

The Supreme Court of the territory was therefore authorized to affirm the judgment rendered by the District Court upon the general verdict for the plaintiffs, if the facts contained in the record supported any count in the declaration, as we have seen that they did. And there can be no doubt of its authority to make its affirmance of the judgment conditional upon the plaintiffs' remitting part of the interest awarded below. Bank of Kentucky v. Ashley, 2 Pet. 327. * * *

BENNETT v. BUTTERWORTH.

11 Howard (U. S.), 669. [*1850.*]

This case was brought up by writ of error, from the District Court of the United States for the District of Texas.

In 1848 Butterworth filed the following petition against Bennett: * * *

"The petition of Samuel F. Butterworth, who is a citizen of the State of New York, against John H. Bennett, who is a citizen of the State of Texas, would respectfully represent unto your

tained, their verdict was properly rendered, but its generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the instructions given."

honor that heretofore, viz., on the —— day of March, 1846, at ————, to-wit, in the district aforesaid, he, your petitioner, was lawfully seized and possessed of four negroes, slaves for life, whose names and descriptions are as follows: viz.: Billy, a negro man, of a dark complexion, aged about twelve years, of the value of five hundred dollars; Lindsey, a negro man, of a dark complexion, aged twenty-two years, and of the value of one thousand dollars; Betsy, a mulatto woman, of a light complexion, aged about thirty years, and of the value of eight hundred dollars; and Alexander, a boy of a very light complexion, aged about four years, and of four hundred dollars value, of his own property. And being so possessed, your petitioner, afterwards, to-wit, on the day and year aforesaid, in the district aforesaid, casually lost the same out of his possession, and the same, afterwards, to-wit, on the day and year aforesaid, in the district aforesaid, came to the possession of the defendant by finding. And your petitioner charges, that the said defendant, well knowing the said negro slaves to be the property of your petitioner, and of right to belong and appertain to him, hath not as yet delivered the above described negroes, or any or either of them, although often requested so to do, to your petitioner; but hath hitherto wholly refused so to do, and hath detained, and still doth detain, the same from your petitioner, who says he has received damages, by reason of the detention of the slaves aforesaid, of five thousand dollars. * * *

The plea of the defendant set up a title to the slaves in himself; averring that a dispute had existed between Butterworth and one John D. Amis and one Junius Amis, which had been left to arbitration; that the referees had decided, amongst other things, that Butterworth should transfer certain negroes to Amis; that Butterworth delivered the negroes, which were those in question; that Amis sold the negroes to him, Bennett; and the plea concluded in this way:

"Wherefore the said John H. Bennett says the said four negroes are his property, and not the property of the said Butterworth, and of this he puts himself upon the country."

To this plea Butterworth replied, that all the parties to the submission and decision in the plea set out did not assent and agree to the same, and that Butterworth did not sell, convey and deliver the negroes in the petition mentioned in compliance with the terms, or any of the terms, of the said decision.

Upon these allegations a jury was sworn, who found the following verdict:

"We, the jury, find for the plaintiff twelve hundred dollars, the value of the four negro slaves in suit, with six and a quarter cent damages.

"C. C. HERBERT, Foreman."

And thereupon the plaintiff, by his attorney, in open court, released the said judgment for twelve hundred dollars as aforesaid. It is therefore considered by the court that the plaintiff recover of the defendant the negro man Lindsey, the negro woman Betsy and her child, and the negro boy Billy, the negro slaves in the petition of plaintiff mentioned, and also six and a fourth cents, the damages by the jurors aforesaid assessed, and also his costs about his suit in this behalf expended. * * *

Mr. Chief Justice TANEY delivered the opinion of the court. * * *

There is nothing in these proceedings which resembles a bill or answer in equity according to the rules prescribed by this court, nor any evidence stated upon which a decree in equity could be revised in an Appellate Court. Nor was any equitable title set up by Butterworth, the plaintiff, in the court below. He claimed in his petition a legal title to the negroes, which the defendant denied, insisting that he himself was the legal owner. It was a suit at law to try a legal title.

The defendant (Bennett) in his plea or answer claimed under an award to which Butterworth and a certain Junius Amis and a certain John D. Amis were parties; and averred that, in execution of this award, the said negroes had been delivered by Butterworth to John D. Amis as his property, and by him afterwards transferred to Bennett for a valuable consideration. To this plea Butterworth replied, that all the parties to the submission and decision in the plea set out did not assent and agree to the same, and that Butterworth did not sell, convey and deliver the negroes in the petition mentioned, in compliance with the terms, or any of the terms, of the said decision. And upon these allegations a jury was sworn, who found for Butterworth (the plaintiff in the court below) in the following words: "We, the jury, find for the plaintiff twelve hundred dollars, the value of the four negro slaves in suit, with six and a quarter cents damages."

And the record proceeds to state, that thereupon the plaintiff

(Butterworth), by his attorney, in open court, released the said judgment for $1,200; and thereupon the court adjudged that he recover of the defendant the four negroes mentioned in his petition, and the six and a quarter cents assessed by the jury, and his costs.

It does not appear whether any direction to the jury, as to the law of the case, was asked for by either of the parties, or given by the court; we have nothing but the pleadings, confused and loose as they are, and the verdict and the judgment.

Now if anything is settled in proceedings at law where a jury is impaneled to try the facts, it is that the verdict must find the matter in issue between the parties, and the judgment of the court must conform to and follow the verdict.

But here the matter in issue was the property in these negroes, and the verdict does not find that they are the property of the plaintiff or the defendant, but finds for the plaintiff their value, which was not an issue. It ought, therefore, to have been set aside upon the motion of either party, as no judgment could lawfully be entered upon it. It was a verdict for a matter different from that which they were impaneled to try.

In the next place, if any judgment could have been rendered on the verdict, it ought to have been a judgment for the money found by the jury. For the trial of facts by a jury would be of very little value, if, upon a verdict for money to a certain amount, the court could infer that the jury intended to find something else, and give a judgment for property instead of money. And lastly, when the plaintiff, in the District Court, released the $1,200 found by the jury, there was nothing of the verdict remaining, upon which the court could act or give judgment for either party, but the six and a quarter cents damages which the jury found in addition to the value.

The judgment is evidently erroneous, and must be reversed. And as these errors are patent upon the record, they are open to revision here, without any motion in arrest of judgment, or exception taken in the District Court.

TAYLOR v. WILLES.

Croke, Carolus, 219. [*1630.*]

Error upon a judgment in *Exeter,* in an action on the case upon an assumpsit, that in consideration the plaintiff Willes would deliver two hundred and a quarter of woad, the defendant Taylor assumed to pay as much as it should be reasonably worth, and upon another consideration assumed to do another act. Taylor pleaded non assumpsit. The jury find *quod assumpsit,* and assess for damages thirty-three pounds six shillings eight pence, to be paid in dyeing, if by law it may be, and assess for costs six shillings eight pence. The judgment given was, that he should recover the thirty-three pounds six shillings eight pence for damages assessed by the jury, and the costs; upon which a writ of error was brought.

Germyn, for the plaintiff in the writ of error, assigned for error: First, that the verdict is ill, because they find generally *quod assumpit,* and do not divide them, being several. *Sed non allocatur;* for if they were upon several promises, yet *"non assumpsit"* generally is good; and the verdict so general is good.[1]

Secondly, because it was found that the damages of thirty-three pounds six shilling eight pence are to be paid in dyeing, if by law it may be. *Sed non allocatur;* for the finding the assumpsit is good enough, and so was the assessing damages to thirty-three pounds six shillings eight pence; but that which is found after is void; and the judgment omitting that which was void is good enough. The judgment was therefore affirmed.

[1] At an early period great strictness in form was required. Hobbs v. Blanchard, Style, 167 (1649).

"Blanchard brought an action of trespass in the court at Norwitch against Hobbs, and had a verdict and a judgment. The defendant brought a writ of error to reverse the judgment. The error assigned was that the jury had not found the issue joined; for the issue joined is *de injuria sua propia absque tali causa,* and the jury have found not guilty generally. Panel of counsel with the defendant in the writ of error said that the jury have found the effect of the issue, though they have not found the very words, and therefore it is good enough, and he cited Fabian & Kingstone's case, 32 Eliz., and Wingrave & Homes his case, 3 Car., entered 2 Car. rot. 632. ROLL, chief justice, answered, that the verdict found the issue argumentatively only, and not directly; and therefore it is not good. JERMAN, justice, was of the same opinion; and the judgment was reversed, except better cause shown."

FENWICK v. LOGAN.

1 Missouri, 401. [*1823.*]

M'GIRK, C. J. This was an action of trespass for assault and battery. Two pleas were pleaded: First, the general issue; and second, a justification of *son assault demesne*. A jury was impaneled to try the issues, and they returned a verdict of guilty, generally, without saying anything about the justification. A motion was made to arrest the judgment, and set aside the verdict, on the ground that there was no finding on the special plea; and this motion was overruled, and judgment for the plaintiff. The cause is brought here by writ of error, and the want of a finding on the special plea assigned for error. The law is, that the verdict must find all in issue, otherwise it is bad. The general issue, only, puts in question the fact of the assault and battery; and the special plea puts in issue the excuse allowed by law for doing the act; and if the justification is found for the defendant, he, though he did the act, is to be discharged. Here, only the fact of doing the act was inquired into; and his discharge, or justification therefor, is not inquired into.

The judgment is, therefore, erroneous, and is reversed. The cause is remanded to the Circuit Court, to try both issues. The costs of this writ of error are to be paid by defendant in error.[1]

WILDERMAN v. SANDUSKY.

15 Illinois, 59. [*1853.*]

TREAT, C. J. Sandusky brought an action of trespass against four persons of the name of Wilderman. The cause was submitted to a jury as to all of the defendants. The verdict was as follows: "We, the jury, find the three defendants, Nancy Wilderman, Simon Wilderman and Garrison Wilderman, guilty, and assess the plaintiff's damages at $35." The court overruled

[1] As to conforming to the pleadings, see Pepy's case, 3 Leonard, 80, *ante*, p. 513.

a motion for a new trial, and rendered judgment against the three defendants. They prosecuted an appeal.

Upon a full examination of the evidence, we are satisfied that the court committed no error in refusing to grant a new trial.

It is insisted that the verdict was defective and that the court erred in rendering any judgment upon it. In our opinion, the verdict was substantially good. It may properly be regarded as a finding on all of the issues; and the judgment may be considered as a final disposition of the whole case. The case, as to all of the defendants, was submitted to the jury; and they found affirmatively that three of them were guilty. In legal contemplation this amounted to a negative finding of not guilty as to the other defendant. The case of Stoltz v. The People, 4 Scam. 168, is in principle directly in point. In that case the indictment contained two counts, each charging a different offense. The verdict was simply guilty as to the first count. On error brought by the defendant, this court affirmed the judgment entered on the verdict, on the ground that the verdict amounted to a finding of not guilty on the second count, and that the defendant could never again be put on his trial for the offense charged therein. The case of Swinney v. The State, 8 S. & M. 576, holds the same doctrine. This view of the case can not operate to the prejudice of Jacob Wilderman. He may rely on the verdict and judgment as a bar to any further prosecution. Nor have the appellants any cause to complain. In actions of this character, the plaintiff may sue any or all of the parties concerned in the act. The jury may convict one and acquit another. If one is compelled to pay the damages awarded, he can not enforce contribution from his co-defendant.

Judgment affirmed.[1]

(c) *Special Verdicts.*

REX v. FRANCIS.

2 Strange, 1015. [*1735.*]

The defendants were indicted at the assizes in Somersetshire, for that they feloniously made an assault on Samuel Cox in the

[1] But see Schweikhardt v. St. Louis, 2 Mo. App. 571.

King's highway, and put him in fear, and £9 in money from the person of Cox did take, steal and carry away. Upon not guilty pleaded by all the defendants, the jury find this special verdict:

That Samuel Cox, traveling on horseback on the King's highway to Somerton fair, on a place called King's Down Hill in the County of Somerset, saw all the prisoners in company together, one of whom was then lying on the ground; that Cox passed by them, and one of them (but which the jury do not know) called to Cox and desired him to change half a crown, that they might give something to a poor Scotchman then lying on the ground, who was one of the prisoners. Cox came back, and putting his hand in his pocket to pull out his money in order to give them change, as they desired, he pulled out four moidores and a Portugal piece value £3, 12d, and having the pieces of gold in his hand, John Francis, one of the prisoners, gently struck Cox's hand, in which he held the gold, by means whereof the gold fell on the ground; that thereupon Cox got off from his horse and said to the prisoners that he would not lose his money so; and the said Cox then and there offering to take up the pieces of gold, which were then upon the ground, and in Cox's presence; the prisoners then and there swore, that if he touched the pieces of gold they would knock his brains out; whereby he was then and there put in bodily fear of his life, and then and there desisted from taking up the pieces of gold. That the prisoners then and there immediately took up the gold, and got on their horses and rode off with the gold; that Cox immediately thereupon pursued them, and rode after them for about half a mile; and then the prisoners struck him and his horse, and swore that if he pursued them any farther they would kill him; by reason of which menace he was afraid to continue his pursuit any farther; but whether upon the whole matter the prisoners are guilty of the felony and robbery charged on them the jury doubt, and pray the advice of the court. *Et si, etc.*

This special verdict and the prisoners were removed into the King's Bench, where it was twice argued at the bar. And upon the first argument the only question was, whether a taking in the presence be in point of law a taking from the person, and it was unanimously determined that it was.

But then a doubt arose (which occasioned the second argument) whether it was sufficiently found to have been taken in the presence of Cox, it not being said so in express words; and

after it had been argued in B. R. upon the point, it was ordered to be argued again at Serjeants' Inn Hall before all the judges of England, where I attended on behalf of the prisoners against Mr. Hussey, who argued for the King, and insisted that here was sufficient found to constitute the crime of robbery, it being found that Cox was put in fear, and that the money was in his possession, till one of the prisoners struck it out of his hand; and the finding that the prisoners immediately took it up, excludes all possibility of *mesne* acts, such as Cox's going away before they took it up; and that to excuse them it should have been expressly found that Cox did go away before the money was taken up.

STRANGE, *contra*, I shall not dispute but that a taking in the presence is a taking from the person, and consequently a robbery, where it is accompanied with the other necessary circumstances. But the question here is, whether this is found to be a taking in the presence of Cox. It is unnecessary to cite cases, to prove that on these verdicts nothing is to be intended; judges have always guarded against that with great caution. It has gone so far that where it stands indifferent which way the fact is to be taken, the turn of the scale is never given against the prisoner. And therefore in Keat's case, 5 Mod. 287, Skin. 666, where on an indictment for killing his gardener the jury found that the master struck the gardener, and the gardener struck the master, and the master gave him a mortal wound, the judges would not determine that the master struck first, so as to make it murder; and yet from the manner of finding any one would be led to collect that the first blow was given by the master. It must be agreed that here is no finding in express words, that the taking was in his presence. But it is contended that here is that which is tantamount. Now I insist, that how great room soever here is to infer the presence of Cox; yet it not being found as a fact that he was present at the taking up the money, and that being a circumstance material to constitute it a robbery, the prisoners must be discharged. * * *

After this argument the judges took time to consider it. And this term the chief justice declared that all the judges, except CARTER, COMYNS and THOMPSON, who only doubted, were of opinion that the fact of Cox's presence at the taking was not sufficiently found, though there seems to have been evidence enough to warrant such a finding. That the whole rested on the word

immediately, then and there serving only for a venue, and immediately was a word too loose and uncertain. In Stephen's Thesaurus it is rendered *cito* and *celeriter;* in Cowper, by and by, and in other dictionaries, *Sine dilatione* and presently. In legal proceedings it does not exclude all *mesne* times and *mesne* acts. In Oneby's verdict it is used five times to different purposes. In Mawgridge's twice. On the statute 27 Eliz., Chap. 13, § 11, the notice for hue and cry must be in convenient time; and yet on declaring you aver that it was immediate, which is supported by proof of a convenient time. The cases cited show how nice the judges have always been; and, therefore, as here wants one necessary ingredient to make it a robbery, the prisoners must be discharged from this indictment. * * *

MARTEN v. JENKIN.

2 Strange, 1145. [*1741.*]

On a mandamus to swear the plaintiff into the office of mayor of Winchelsea, it appeared by a special verdict that the mayor must be chosen out of the jurats, and that the plaintiff, 1 May, 1739, was chosen a jurat, and sworn in, and continued so till 7 April, 1740, when he was chosen mayor; that he had received the sacrament within a year before his election to be mayor, but not within a year before he was chosen a jurat. And the question was, whether the statute 5 Geo. 1, Chap. 6, § 3, could operate so as to give him the benefit of the non-prosecution in six months with regard to the previous qualification. And the court held it did, else he would be under some degree of disability or incapacity, when the act says none shall be incurred.

But then a doubt was made, whether as the verdict was silent as to any prosecution, it was sufficient for the court to give judgment upon; and whether it should not have been found negatively, there was none. But the court held it well enough, for the plaintiff had nothing more to do than to find his election; what is to avoid it, should come from the other side; and that as it is not found, there was a prosecution, which it lay upon the defendant to show; they could not be warranted in saying the plaintiff's election was done away; and therefore they gave judgment for the plaintiff.

TANCRED v. CHRISTY.

12 Meeson & Welsby, 316. [*1843.*]

The facts of this special case (see 9 M. & W. 438) having been turned into a special verdict, a writ of error was brought by the defendants below. The special verdict differed from the special case only by setting out the argument (!) at full length. The exceptions to the judgment, stated by the plaintiffs in error, were as follows:

"On the argument the plaintiff in error Tancred will contend that the special verdict does not show any liability on his part for the use and occupation of the premises in question, during any of the time for which the judgment is given; that his liability arose on his contract for the term and ceased on the 24th of June, A. D. 1839.

"That the holding over by a co-tenant, if such is in fact shown in the special verdict, does not bind him, unless it expressly appears that he assented to the holding over, and in no part of the special verdict is it found that he so assented. * * *

TINDAL, C. J. This was an action for the use and occupation of certain premises, subsequent to Michaelmas, 1839. Christy, the defendant in error, had let them to the plaintiffs in error and others for a year certain, by a written agreement, which expired at midsummer, 1839. The special verdict finds that the lessees were the provisional directors of a banking company, that one of the plaintiffs in error, Tancred, ceased to be a director in January, 1839, long before the expiration of the year, and that the premises continued to be occupied by the banking company after the year, for which occupation, subsequent to one year, compensation was sought to be recovered in the action. But the special verdict is entirely silent as to Tancred's assenting to such occupation, and as to his being or not being at any time a partner in the company. We are of opinion that it is essential to the due determination of this case that those facts should be found one way or the other. If there was no direct evidence in respect of them, still they are inferences of fact, which must be drawn one way or the other from the other facts stated, and those inferences must be drawn by the jury and cannot be drawn by a court of error. It appears that the argument in the Court of Exchequer was upon a case reserved, and not on a special verdict,

so that the court below was at liberty to draw, and it appears, by the judgment reported, did draw, inferences of fact, the propriety of which we do not in the least question. But unfortunately, we are not at liberty to do the same upon this special verdict, which is so imperfect that we cannot give any judgment upon it, and we, therefore, hold that there must be a *venire de novo* awarded, as was done in the case of R. v. Trafford and others (8 Bing. 204; 1 M. & Scott, 401; 2 C. & J. 265).

Venire de novo.

WALLINGFORD v. DUNLAP.

14 Pennsylvania St. 31. [*1850.*]

Error to the District Court of Allegheny.

This was an action on the case, brought by John Dunlap against Wallingford and others, for injuries alleged to have been done by defendants to two houses of the plaintiff, in Pittsburgh, by undermining and otherwise injuring the same. The defendants in preparing a foundation for a house, which they were about to erect on ground adjoining, had ground alongside or near plaintiff's house dug away, and it was alleged that this was done without taking proper precautions, and that the houses of plaintiff were injured.

After the evidence was closed, LOWRIE, J., charged the jury.

He stated that the counsel have raised several points of law, which might possibly not arise at all, if the facts of the case were settled. That it was agreed that a special verdict be found on the disputed facts, and that the court shall enter such judgment thereon, and on the facts not disputed, as the law requires. He stated to the jury certain undisputed facts and referred other alleged facts to the consideration of the jury, and directed them that "if you should find that the plaintiff's wall was not built of proper materials, or in a workmanlike manner, and that it sunk from its own inherent defects, or that the plan adopted for the preservation of the wall was the result of the joint consultation of the plaintiff and defendants, or was in pursuance of the advice and direction of the plaintiff, and that the plan was carefully and skilfully executed, even though by a different

plan the wall might have been saved; in either of these cases you will find for the defendants. If on both of these points you should find for the plaintiff, then you will say what damages the plaintiff has sustained," etc.

The jury returned a negative answer to the first two questions submitted, assessed damages in favor of the plaintiff for $433.75 and further found other facts.

A motion for a new trial was made, but judgment was entered for the plaintiff for the damages found by the jury.

It was assigned for error that the court erred in entering judgment in favor of the plaintiff on the special verdict for various reasons assigned.

COULTER, J. The judgment in the court below is founded partly on facts found by a special verdict, and partly on what the court say are undisputed facts. The court enumerates to the jury what are the undisputed facts, and directs them to find a special verdict on the disputed facts. The court say to the jury, "It is therefore agreed that you shall find a special verdict on the disputed facts, and that the court shall enter such judgment thereon, and on the facts not disputed, as the law requires." The paper book states that the jury returned negative answers to the two first points submitted to them, and then found specially, as to the disputed facts.

This proceeding is entirely anomalous. It is unknown, and unrecognized by the common law, or by the practice under the statute of Westminster the 2d, 13 Ed. 1, Chap. 30, which in fact originated the special verdict, as it now exists. There did exist another species of special verdict, as where the jury returned a general verdict for the plaintiff, subject, nevertheless, to the opinion of the court, on a special case, stated by the counsel, on both sides, on a matter of law: 3 Black, 378. But this proceeding has gone out of practice, perhaps never existed in Pennsylvania, and is nothing like the present case. A special verdict is where the jury find the facts of the case, leaving the ultimate decision of the cause upon those facts, to the court, concluding conditionally, that if upon the whole matter thus found, the court should be of opinion that the plaintiff had a good cause of action, they then find for the plaintiff, and assess his damages; if otherwise, then for the defendant: 3 Black, 378;

Boote on Suit at Law, 158. It is of the very essence of a special verdict that the jury should find the facts, on which the court is to pronounce judgment according to law; 1 East, 111; Lord Raymond, 1581. And the court will not intend any thing, especially any fact not found by the jury; 1 Wilson, 55; 1 Caine, 60; 20 Johns. Rep. 294. An instance of which is found in 11 Wheaton, 445, where the assent of an executor is necessary, if the jury find a special verdict stating facts from which they might have inferred such assent, but do not find it expressly, the court cannot intend it. I apprehend there is no reported case, of any authority, where the court have gone beyond the facts found in the special verdict; for it is the province of the jury to judge of and find the facts, and the province of the court to declare the law on the facts so found. The undisputed facts ought to have been incorporated into the special verdict. And if they had omitted them by mistake, the court might upon motion and full evidence, have amended the special verdict: Strange, 514; 4 Watts. 259. But the court is confined to the facts found by the special verdict: 2 Yeates, 543; 3 Yeates, 373. And when a special verdict is given, the court ought to confine its judgment to that verdict.

As to what the jury intended by a negative answer to the two first points submitted to them, it is not permitted us to intend what they meant, as they have not expressly found. Nor can we predicate our judgment partly upon what the court below say were undisputed facts, and partly on the facts found.

The special verdict is defective. We have no power to amend it. It is the duty of the plaintiff's counsel to have the special verdict properly drawn up, settled and entered on the record: 1 Johns. Cases, 393; Coleman's Cases, 107. If the facts are reduced to writing at the time of the trial, and have the assent of the jury, the verdict may be moulded into form afterwards, with the approbation of the court.

But this special verdict is so defective and erroneous, and the judgment so anomalous in being entered partly on the verdict, and partly on what are called undisputed facts, that we must do what has often been done before, reverse the judgment and send the case back for a new trial. If a special verdict is defective or uncertain, and cannot be amended, judgment ought not to be entered upon it. And when it is entered, the judg-

ment must be reversed as erroneous: Lord Ray'd, 1584; Strange, 887-1124; 6 Cranch, 268; 1 East, 111.

Judgment reversed and venire de novo awarded.[1]

ROBERTS v. HOPKINS.

11 Sergeant & Rawle, 202. [*1824.*]

TILGHMAN, C. J. In this case the jury found a verdict for the plaintiff, with $517 damages, and six cents costs, "subject to the opinion of the court on the facts proved." What these facts were, we know not; so that it is impossible for us to say, whether the judgment was right or wrong. If such a verdict could be supported, the party against whom judgment was given, would be cut off from the benefit of a writ of error. The jury have no right to throw the facts and the law, on the court, though they may find the facts and submit the law. But in such case, the facts appearing of record, either party may have a writ of error. In the present case, nothing is found absolutely. The damages are not assessed absolutely, but subject to the court's opinion on facts which do not appear. It is an imperfect verdict. The parties may submit their cause to the court, in what manner they please, by consent; and if they think proper to submit it, so as to preclude each other from a writ of error, it is all very well. But nothing of that kind appears here. We find nothing on the record but the verdict and judgment. In the case of Donner v. Lewis, at May term, 1822, there was a verdict for the plaintiff in an ejectment, "subject to the opinion of the court," without any mention of facts. We reversed the judgment and ordered a new trial. The case before us falls

[1] Accord, Hodges v. Easton, 106 U. S. 408. The contrary rule in Wisconsin appears to be the result of a statute; see OSBORN, J., in Stringham v. Cook, 75 Wis. 589: "The statute requires only controverted issues of fact to be submitted to the jury for special verdict, and there was no controversy about the ownership of the land or right of possession of the property, and the evidence was undisputed. There was no evidence to overcome the presumption or *prima facie* evidence of title in fee, imported by the certificate."

The verdict need not include matters admitted by the pleadings. Barto v. Hinsard, 8 N. Y. 483.

within the same principle. A reference to facts proved, without stating these facts, is no better than if facts had not been mentioned at all. It is the opinion of the court that the judgment should be reversed and a *venire de novo* awarded.

Judgment reversed and a venire facias de novo awarded.

BARNES v. WILLIAMS.

11 Wheaton, 415. [*1826.*]

Mr. Chief Justice MARSHALL stated, that, upon inspecting the record, it had been discovered, that the special verdict found in the case was too imperfect to enable the court to render a judgment upon it. The claim of the plaintiffs being founded upon a bequest of certain slaves, it was essential to a recovery at law, that the assent of the executor to the legacy should be proved. Although, in the opinion of the court, there was sufficient evidence in the special verdict from which the jury might have found the fact, yet they have not found it, and the court could not, upon a special verdict, intend it. The special verdict was defective in stating the evidence of the fact, instead of the fact itself. It was impossible, therefore, that a judgment could be pronounced for the plaintiff. So, as to the defendant's defense under the statute of limitations, the special verdict did not find any facts by which the court could ascertain at what time the right of action accrued. It was not stated that the plaintiff and defendant were ever resident in the same state at the same time. Although it was found, that E. D. Barnes, one of the plaintiffs, came into the State of Tennessee after he arrived at the age of twenty-one years, and more than three years before the suit was brought, yet it was not found, that during any part of that time, the defendant, Williams, was resident in that state. The case was, therefore, too imperfectly stated to enable the court to decide the questions upon which the opinions of the judges of the Circuit Court were opposed, and the cause was remanded to the court, with directions to award a *venire facias de novo.*

GORDON v. STOCKDALE.

89 Indiana, 240. [*1883.*]

MORRIS, C. * * * The appellant insists that the verdict does not find that appellee was the owner of the wheat in controversy, as alleged in the complaint. The appellee contends that the verdict finds facts from which the conclusion of ownership necessarily follows as matter of law.

The jury do not find directly and in so many words, that the wheat belonged to the appellee, but they do find that he sowed the wheat as tenant, under a contract which gave the one-half of it to him, and the right to the possession of the whole of it for the purpose of harvesting, threshing and dividing it.

It is not claimed by the appellant in argument that the contract between the appellee and Henry P. Chapman was not made with the consent of Mrs. Chapman; but, as claimed by the appellee, it seems to be conceded that the contract was valid and binding upon her, and upon the parties to it. Assuming, in view of this concession on the part of the appellant, that Henry P. Chapman was authorized by Mrs. Chapman to make the contract returned with and as a part of the verdict, we think it quite clear that the facts found show that the appellee was the owner of one-half the wheat growing on the "Alcorn farm," and entitled to the possession of the whole of it until harvested and threshed. The contract gave him the right to harvest and thresh the wheat, and by its express terms he was the owner of one-half of it. The conclusion of law upon the facts thus found is, that the appellee owned one-half the wheat, and was entitled to the possession of the whole of it for the purpose of harvesting, threshing, and dividing it. The appellant says that the ownership is not found otherwise than by inference. That may be true, but the inference is a legal conclusion which results irresistibly from the facts found.

It is also argued by the appellant that the contract made Chapman and the appellant partners. The contract, as to the wheat, provides otherwise. It expressly declares that each shall own one-half the wheat.

It is also contended by the appellant that the jury have not found a conversion of the wheat by him; that they have only found facts which operate as evidence of a conversion; that a

demand and refusal are evidence of conversion, but not conclusive of the fact of conversion. This is true, and had the jury found nothing more than this, the judgment could not be justified. Locke v. Merchants Nat. Bank, 66 Ind. 353. But the jury also found that the defendant took possession of the growing wheat, excluded the appellee from it, harvested and threshed it, and refused to deliver any part of it, upon demand, to the appellee. The acts amounted to a conversion of the wheat, and not merely to evidence of a conversion of it. Taking possession of the wheat and cutting and threshing it were acts of dominion wrongfully exerted over the property in dispute, in defiance of the rights of the appellee, and amounted to a conversion of it. If, as the verdict finds, the appellant exercised dominion over the wheat, in exclusion or in defiance of the appellee's rights, this, in law, was a conversion. Cooley Torts, 448; Thompson v. Currier, 24 N. H. 237; Shaw v. Peckett, 25 Vt. 423. We think there is no error in the record.

Per CURIAM. It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the cost of the appellant.

(d) *Special Findings.*

Hurd's Rev. Statutes of Illinois, 1913, Chap. 110.

[79. MAY RENDER GENERAL OR SPECIAL VERDICT—WHEN TO FIND SPECIALLY ON QUESTION OF FACT—REFUSAL TO SUBMIT QUESTION OF FACT, ETC.—WHEN SPECIAL FINDING OF FACT INCONSISTENT WITH GENERAL VERDICT.] § 79. In all trials by jury in civil proceedings in this state, in courts of record, the jury may render, in their discretion, either a general or a special verdict; and in any case in which they render a general verdict, they may be required by the court, and must be so required on request of any party to the action, to find specially upon any material question or questions of fact which shall be stated to them in writing, which questions of fact shall be submitted by the party requesting the same to the adverse party before the commencement of the argument to the jury. Submitting, or refusing to submit a question of fact to the jury when requested by a party, as above provided, may be excepted to and be review on appeal or writ of error, as a ruling on a question of law. When the special finding of fact is inconsistent with the

general verdict, the former shall control the latter and the court may render judgment accordingly.[1]

RICHARDSON v. WEARE.

62 New Hampshire, 80. [*1882.*]

Case for damages from a defective highway, tried on the general issue. After the jury had received general instructions, which included the instruction that if the injury was in any degree the result of the plaintiff's want of ordinary care, the verdict must be for the defendants, by request of the defendants' counsel the jury were directed to answer this question: Did the injury to the plaintiff occur in consequence of any neglect or fault on his part? A general verdict was returned for the plaintiff, and the special question was answered in the affirmative. The court ordered judgment for the defendants, and plaintiff excepted.

ALLEN, J. It was decided, in Walker v. Sawyer, 13 N. H. 191, 196, 197, that, in a case tried on the general issue, the court would not submit a particular question of fact to be found and returned by their verdict, without the consent of the parties. But when it is proposed to submit specific questions to the jury, it will be taken for granted that the parties assent, unless they object at the time, and before the jury retires. Willard v. Stevens, 24 N. H. 271, 277; Allen v. Aldrich, 29 N. H. 63. And later, in Barstow v. Sprague, 40 N. H. 27, 33, it has been decided that the court, against the objection of either or both parties, may properly direct a jury to return, with a general verdict, answers to specific questions submitted to them. No objection having been taken, at the time, to the submission of the special

[1] 1 VAUGHAN, C. J., in Bushell's case, Vaughan, 135: "The legal verdict of the jury to be recorded is, finding for the plaintiff or defendant. What they answer, if asked questions concerning some particular fact, is not of their verdict essentially, nor are they bound to agree in such particulars; if they all agree to find their issue for the plaintiff or defendant, they may differ in the motives wherefore, as well as judges in giving judgment for the plaintiff or defendant may differ in the reasons wherefore they give that judgment, which is very ordinary."

question to the jury in this case, the plaintiff must be understood to have consented, and the objection after verdict comes too late.

The special finding of fact was conclusive (Walker v. Sawyer, *supra*, 196, 197; Willard v. Stevens, *supra*, 277), and, being a material fact upon which the general result depends, it must control the general verdict. The court having given specific and correct instructions to the jury upon the subject, and that their general verdict must be for the defendants, if they should answer the question in the affirmative, the plaintiff could not have been prejudiced nor the jury embarrassed by the question. Johnson v. Haverhill, 35 N. H. 74, 87. Upon the answer to the special question, the defendants were entitled to a general verdict and judgment.

Exceptions overruled.[1]

WALKER v. SOUTHERN PAC. R. R. CO.

165 U. S. 593. [*1896.*]

On November 3, 1886, A. C. Walker commenced this action in the District Court of the Second Judicial District of the Territory of New Mexico in and for the county of Socorro, against the railroad company defendant, to recover damages resulting from an overflow of his lands, caused, as charged, by a wrongful obstruction of a natural watercourse. Subsequently, an amended declaration was filed, and after the death of A. C. Walker the action was revived in the name of his administratrix, the present plaintiff in error. After some preliminary proceedings, a trial was had in December, 1892, on which trial the jury returned a general verdict, finding the defendant guilty, and assessing the plaintiff's damages at $9212.50. At the same time the jury returned, in response to certain question submitted by the court, special findings of fact. The trial court, overruling all other motions, entered a judgment in favor of the defendant, on the ground that the special findings of fact were inconsistent with and controlled the general verdict; and that upon such findings of fact the defendant was entitled to judgment. The case was thereafter taken to the Supreme Court of the territory, by which

[1] A special finding may show that the admission of incompetent evidence was harmless, and thus enable the prevailing party to retain his verdict. Barstow v. Sprague, 40 N. H. 27.

court, on August 26, 1893, the judgment was affirmed, 34 Pac. Rep. 43, and thereupon the plaintiff sued out this writ of error.

Mr. Justice BREWER delivered the opinion of the court.

The testimony was not preserved, and the case is submitted to us upon the pleadings, the verdict, the special findings of fact and the judgment; and on the record as thus presented plaintiff in error rests her claim of reversal upon three propositions: First, that the act of the territorial legislature, authorizing special findings of fact and providing for judgment on the special findings, if inconsistent with the general verdict (Laws of New Mex. 1889, Chap. 45, p. 97), is in contravention of the Seventh Amendment to the Constitution of the United States, which reads:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Second, that there is no such conflict between the general verdict and the special findings as authorized a judgment contrary to the general verdict; and, third, that if there be any conflict between the special findings and the general verdict, the special findings are so inconsistent with each other as to neutralize and destroy themselves.

First, with regard to the constitutional question, the specific objection is thus stated in the brief:

"It is not contended, although the English authorities would appear to warrant the contention, that at the common law the judge might not require the jury to answer special questions, or interrogate the jury as to the grounds upon which their general verdict was found; but it is most earnestly contended that the extent of the power of the judge, if in his opinion the special findings or answers of the jury to interrogatories were inconsistent with the general verdict, was to set aside the general verdict and award a *venire de novo*, while under this statute authority is attempted to be conferred upon the judge to render final judgment upon the special findings."

We deem it unnecessary to consider the contention of defendant in error that the territorial courts are not courts of the United States, and that the Seventh Amendment is not operative in the Territories, for by the act of April 7, 1874, Chap. 80, 18

Stat. 27, Congress, legislating for all the territories declared that no party "shall be deprived of the right of trial by jury in cases cognizable at common law;" and while this may not in terms extend all the provisions of the Seventh Amendment to the territories, it does secure all the rights of trial by jury as they existed at common law.

The question is whether this act of the territorial legislature in substance impairs the right of trial by jury. The Seventh Amendment, indeed, does not attempt to regulate matters of pleading or practice, or to determine in what way issues shall be framed by which questions of fact are to be submitted to a jury. Its aim is not to preserve mere matters of form and procedure but substance of right. This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative. So long as this substance of right is preserved the procedure by which this result shall be reached is wholly within the discretion of the legislature, and the courts may not set aside any legislative provision in this respect because the form of action—the mere manner in which questions are submitted—is different from that which obtained at the common law.

Now a general verdict embodies both the law and the facts. The jury, taking the law as given by the court, apply that law to the facts as they find them to be and express their conclusions in the verdict. The power of the court to grant a new trial if in its judgment the jury have misinterpreted the instructions as to the rule of law or misapplied them is unquestioned, as also when it appears that there was no real evidence in support of any essential fact. These things obtained at the common law; they do not trespass upon the prerogative of the jury to determine all questions of fact, and no one today doubts that such is the legitimate duty and function of the court, notwithstanding the terms of the constitutional guarantee of right of trial by jury. Beyond this, it was not infrequent to ask from the jury a special rather than a general verdict, that is, instead of a verdict for or against the plaintiff or defendant embodying in a single declaration the whole conclusion of the trial, one which found specially upon the various facts in issue, leaving to the court the subsequent duty of determining upon such facts the relief which the law awarded to the respective parties.

It was also a common practice when no special verdict was demanded and when only a general verdict was returned to interrogate the jury upon special matters of fact. Whether or no a jury was compelled to answer such interrogations, or whether, if it refused or failed to answer, the general verdict would stand or not, may be questioned. Mayor, etc., v. Clark, 3 Ad. & El. 506. But the right to propound such interrogatories was undoubted and often recognized. Walker v. Bailey, 65 Maine, 354; Spurr v. Shelburne, 131 Mass. 429. In the latter case the court said (page 430): "It is within the discretion of the presiding justice to put inquiries to the jury as to the grounds upon which they found their verdict, and the answers of the foreman, assented to by his fellows, may be made a part of the record, and will have the effect of special findings of the facts stated by him. And no exception lies to the exercise of this discretion. Dorr v. Fenno, 12 Pick. 521; Spoor v. Spooner, 12 Met. 281; Mair v. Bassett, 117 Mass. 356; Lawler v. Earle, 5 Allen, 22." So that the putting of special interrogatories to a jury and asking for specific responses thereto in addition to a general verdict is not a thing unknown to the common law, and has been recognized independently of any statute. Beyond this we cannot shut our eyes to the fact that in many states in the Union, in whose constitutions is found in the most emphatic language an assertion of the inviolability of trial by jury, are statutes similar to the one enacted by the territorial legislature of New Mexico; that those statutes have been uniformly recognized as valid, and that a large amount of the litigation in the courts is carried through in obedience to the provisions of such statutes. It would certainly startle the profession to be told that such statutes contravene a constitutional requirement of the inviolability of jury trials.

Indeed, the very argument of counsel for plaintiff in error is an admission that up to a certain extent those statutes are undoubtedly valid. That argument is practically that when the specific findings are returned and found to be conflicting with the general verdict the court is authorized to grant a new trial, but can do no more. But why should the power of the court be thus limited? If the facts as specially found compel a judgment in one way, why should not the court be permitted to apply the law to the facts as thus found? It certainly does so when a special verdict is returned. When a general verdict is returned

and the court determines that the jury have either misinterpreted or misapplied the law the only remedy is the award of a new trial, because the constitutional provision forbids it to find the facts. But when the facts are found and it is obvious from the inconsistency between the facts as found and the general verdict that, in the latter, the jury have misinterpreted or misapplied the law, what constitutional mandate requires that all should be set aside and a new inquiry made of another jury? Of what significance is a question as to a specific fact? Of what avail are special interrogatories and special findings thereon if all that is to result therefrom is a new trial, which the court might grant if it were of opinion that the general verdict contained a wrong interpretation or application of the rules of law? Indeed, the very thought and value of special interrogatories is to avoid the necessity of setting aside a verdict and a new trial—to end the controversy so far as the trial court is concerned upon that single response from the jury.

We are clearly of opinion that this territorial statute does not infringe any constitutional provision, and that it is within the power of the legislature of a territory to provide that on a trial of a common law action the court may, in addition to the general verdict, require specific answers to special interrogatories, and, when a conflict is found between the two, render such judgment as the answers to the special questions compel.

For a full understanding of the second question it is necessary to notice the pleadings. * * *

Now, the contention of the defendant in error is that it is apparent, from the answers given to the special question, that there were no natural watercourses obstructed by defendant's roadbed, and that the water which did the damage was simply surface water. The second, third, fourth and fifth are as follows:

"Q. 2. Was there a cloudburst in the Magdalena or Socorro mountains on September 8, 1886; and, if so, was the water therefrom the water which ran over plaintiff's land? A. Yes.

"Q. 3. Was the water which came down the arroyos from the Magdalena and Socorro mountains on September 8, 1886, surface water? A. Yes.

"Q. 4. Was it customary for water to collect and stand on plaintiff's land, and land in the immediate vicinity thereof, in the times of heavy rains or floods? A. No.

"Q. 5. How often upon an average in any one year did the water come down the arroyos leadings toward the valley in the vicinity of Socorro from the Magdalena and Socorro mountains prior to September 8, 1886? A. According to the rain which fell."

This is very clear. There was a cloudburst in the mountains, and it was the water from that which did the damage. It was simply surface water. And the arroyos through which the water flowed after leaving the mountains were not running streams, natural watercourses, but simply passageways for the rain which fell. Counsel for plaintiff in error, not questioning that the injury done to the property of their client was by surface water —the large fall which came from the cloudburst in the Socorro or Magdalena mountains on September 8, 1886—insist that it does not appear that such cloudbursts were unusual, and also that there had been created through the lapse of years distinctive channels by which the waters from the mountains passed down to the river and that the railroad embankment operated to obstruct such channels; that although these channels were not the beds of constantly flowing streams they were wrought by natural processes and through the flowing of water, not continuous but at frequent intervals, until they had become natural outlets for the often accumulating waters in the Socorro and Magdalena mountains. * * *

It is obvious not only that it was mere surface water whose flow was obstructed, not only that no natural watercourses were filled up, but also that the channels which were obstructed were not such ravines, gorges and outlets as in a mountainous district must be left open to prevent the forming of lakes and reservoirs therein, but simply the ordinary ditches and passageways which surface water will cut in a generally level district in its effort to reach some flowing stream. It also appears from the answer to the twenty-fifth question that the railroad embankment was constructed before the buildings of the plaintiff. It will be borne in mind that the mountains from which this surface water flowed were from four to eighteen miles distant, and from the foot of those mountains to the Rio Grande river, naturally, the flowing water had dug channels and ditches through such portions of the soil as afforded the least obstruction to its passage, and such channels and ditches were all that the railroad embankment in any way obstructed.

Does a lower land owner by erecting embankments or otherwise preventing the flow of surface water on to his premises render himself liable to an upper land owner for damages caused by the stopping of such flow? In this respect the civil and common law are different, and the rules of the two laws have been recognized in different states of the Union—some accepting the doctrines of the civil law, that the lower premises are subservient to the higher, and that the latter have a qualified easement in respect to the former, an easement which gives the right to discharge all surface water upon them. The doctrine of the common law on the other hand is the reverse, that the lower land owner owes no duty to the upper landowner, that each may appropriate all the surface water that falls upon his own premises, and that the one is under no obligation to receive from the other the flow of any surface water, but may in the ordinary prosecution of his business and in the improvement of his premises by embankments or otherwise prevent any portion of the surface water coming from such upper premises. * * *

If a case came to this court from one of the states in which the doctrine of the civil law obtains, it would become our duty, having respect to this which is a matter of local law, to follow the decisions of that state. And in like manner we should follow the adverse ruling in a case coming from one of the states in which the common law rule is recognized. New Mexico is a territory, but in it the legislature has all legislative power except as limited by the Constitution of the United States and the laws of congress appertaining thereto. There it was enacted in 1876, Laws of New Mex. 1876, p. 31, Chap. 2, § 2, that "in all the courts in this territory the common law as recognized in the United States of America shall be the rule of practice and decision." Browning v. Browning, 9 Pac. Rep. 677, 682. The legislature of New Mexico having thus adopted the common law as the rule of practice and decision, and there being no special statutory provisions in respect to this matter, it is not to be wondered at that the Supreme Court of the territory in its opinion in the present case disposed of this question in this single sentence: "If the act of the territorial legislature of 1889 is constitutional, then we can find no error in the action of the court in setting aside the general verdict and entering judgment upon the special findings." Obviously the only question deemed of

any moment by that court was the question in respect to the matter of special findings. * * *

Judgment affirmed.[1]

TERRE HAUTE &C. RY. CO. v. VOELKER.

129 Illinois, 540. [*1889.*]

Mr. Justice BAILEY delivered the opinion of the court:

This was an action on the case, brought by Julia Voelker, administratrix of the estate of Edward Voelker, deceased, against the Terre Haute and Indianapolis Railroad Company, to recover damages for the death of the plaintiff's intestate. The trial, which was had before the court and a jury, resulted in a verdict in favor of the plaintiff for $3500, and for that sum and costs, the court, after denying the defendant's motion for a new trial, gave judgment for the plaintiff. Said judgment was affirmed by the Appellate Court on appeal, and by an appeal from that court the record is brought here for review. . . .

Several questions of fact were, at the instance of the defendant, submitted to the jury for special findings, one of which was modified by the court and submitted as modified. The action of the court in making such modifications is assigned for error. Said question was as follows, the modification consisting in the insertion of the words in *italics:*

"Could the deceased, Edward Voelker, *if he had used ordinary care and diligence,* have seen or heard the defendant's train approaching the crossings over the St. Clair avenue in East St. Louis, if he looked or listened for its approach to said crossing, before he drove or went on to said crossing, at the time he received the injury from the effect of which he died?"

To this question the jury returned a negative answer. It is clear that the question, as proposed by the defendant, called for a finding as to mere evidentiary facts, none of which, if found, could have been controlling. There was no error therefore in refusing to submit it to the jury in that form. Whichever way the jury might have found, their finding could have had no effect upon the general verdict. On this point we refer

[1] See also Victor &c. Co. v. Peccarick, 209 Fed. 568, distinguishing Slocum v. N. Y. Life Ins. Co., 228 U. S. 364.

to what we have more fully said in our discussion of the same proposition in C. & N. W. Ry. Co. v. Dunleavy, *ante*, 132.

The residue of the propositions discussed by the Appellate Court in its opinion do not seem to be insisted upon by the defendant's counsel here, and we therefore infer that, as to those questions, they acquiesce in the rules laid down by that court. None of the assignments of error insisted upon here are in our opinion sustained, and the judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

ACTON v. COFFMAN.

74 Iowa, 17. [*1887.*]

SEEVERS, C. J. * * *

II. Because of the state of the record, there is but one error assigned that can be considered, and that is that, under the special verdict, judgment should have been rendered for the defendant, notwithstanding the general verdict. The court instructed the jury as follows:

"7. If you find from the evidence that, before the defendant commenced any criminal proceedings against the plaintiff, if he did commence any, he laid all the facts in the matter before E. A. Babcock, Esq.; that said Babcock is an attorney at law; that he acted in good faith upon the opinion given by said Babcock; that he believed himself that there was cause for the prosecution,—then he is not liable in this action, and your verdict must be for the defendant."

The following special interrogatories were submitted to the jury:

"(4) Did the defendant, Coffman, seek the advice of an attorney before he instituted the criminal proceedings complained of by plaintiff? (5) Did that attorney, with a full knowledge of all the facts in the case, advise said Coffman that in his opinion a criminal suit was maintainable against this plaintiff? (6) Did defendant act on such advice in commencing the criminal proceedings in controversy herein?"

To each of these interrogatories an affirmative answer was given by the jury, and the question is whether the facts thus

found conclusively show that the general verdict is so inconsistent therewith that it must be set aside. It must be assumed that the jury followed the instructions above set out. Therefore, they must have found that, although plaintiff stated the facts to counsel and acted on the advice of counsel in commencing the criminal action, yet in doing so he did not act in good faith, or that he himself did not believe there was probable cause for the prosecution. It will be observed that the question of the good faith of the defendant, or whether he believed there was probable cause for the prosecution, was not submitted to the jury in the special interrogatories, and, therefore, the general and special verdicts are not inconsistent, and both can stand in full force. It is sufficient to say that, as the instruction above referred to was not excepted to, it constitutes the law of the case, and it was the duty of the jury to follow it, whether right or wrong; but we incline to think it is a correct statement of the law. Center v. Spring, 2 Iowa, 393.

The court did not err in refusing to enter judgment for the defendant on the special verdict.[1]

Affirmed.

PENNSYLVANIA CO v. SMITH.

98 Indiana, 42. [*1884.*]

BLACK, C. The appellee sued the appellant and the Louisville, Evansville and St. Louis Railway Company, and the Jeffersonville, Madison and Indianapolis Railroad Company, the substance of the complaint being that, on, etc., the defendants were operating a railroad running through the city of New Albany,

[1] GREENE, J., in Osburn v. Ry., 75 Kan. 746: "A trial court has a very wide discretion in granting a new trial where the special findings are inconsistent with one another, or are evasive, or apparently unfair, or are inconsistent with the general verdict, but the same rule does not obtain where, notwithstanding a general verdict, the court is asked to enter judgment on the special findings. The final conclusion of a jury is expressed in their general verdict, and special findings are permitted only for the purpose of ascertaining whether the jury have considered and found the elemental ingredients which should inhere in and support their general verdict. In passing upon a motion for judgment upon special findings notwithstanding the general verdict, the

and were in possession of and operating on said railroad a locomotive engine and a train of cars thereto attached; and that while the plaintiff was engaged in unloading boxes of glass from his wagon into cars standing on a railroad switch, the defendants, by their servants, so negligently drove and conducted said engine and train that thereby the same ran and were driven against the plaintiff's said wagon and his horses harnessed thereto, without any fault or negligence on his part, thereby breaking and destroying said wagon, wounding and disabling said horses, etc., whereby the plaintiff was damaged, etc.

The defendants severally answered by general denial. The cause was tried by jury, and a verdict was returned against the appellant and in favor of the other defendants. The jury also returned answers to interrogatories asked by the defendants.

A motion for judgment in favor of the appellant upon the answers of the jury to interrogatories, notwithstanding the general verdict, and the appellant's motion for a new trial, were overruled, and judgment was rendered upon the verdict.

The appellant has assigned as errors the overruling of his said motions. The only interrogatories and answers specially indicated by the appellant as inconsistent with the general verdict are the fourteenth and eighteenth, as follows:

"14. Was the place where the plaintiff's horses and wagon were placed, between the box car on the spur track and the main track, a safe place for the wagon and team, taking into consideration the distance between the outside of the wagon and the outside of passing cars and trains? Answer: No."

"18. Was there not a strong probability that a team standing with their heads toward an approaching train, and with a car on the south side of them, and the main track along which the train was moving toward them as near to them as in the

court is not required to reconcile inconsistent findings. It is not necessarily fatal to the general verdict that the special findings are inconsistent with one another. The question is, Are they, when considered as a whole, so inconsistent with the general verdict that they cannot be harmonized with it? Nor is it enough to warrant a judgment upon the special findings that they may be susceptible of an interpretation which would overthrow the general verdict. Before they will sustain a judgment they must be so inconsistent with the general verdict that they will not bear an interpretation which will harmonize with the general verdict."

present case, would become frightened and unmanageable? Answer: Yes."

In reviewing the ruling upon the motion for judgment upon the answers to interrogatories, notwithstanding the general verdict, we can not look to the evidence; and in order that the answers may control and override the verdict, there must be between them an antagonism, which could not be removed by any evidence admissible under the issue. If any particular answer be thought to be antagonistic to the general verdict, but may be reconciled therewith by the aid of other answers, the general verdict will not be overridden.

Assuming that the evidence showed the collision and damage to the plaintiff, the issue further involved the question whether the appellant was negligent, and, if so, the question whether the appellee was chargeable with contributory fault.

From the fact that the place at which the plaintiff's horses and wagon was placed, with reference to the distance therefrom to passing trains, was, as the event showed, not, as a matter of fact, a safe place, it would not necessarily follow either that the appellant was not negligent, or that there was contributory fault on the part of the appellee. Other facts, which may be readily supposed, might be shown in evidence, which, agreeably with this fact or conclusion, would plainly prove the appellant's negligence and absence of fault on the part of the appellee.

It was not shown by any of the answers of the jury that the team was standing with the heads of the horses toward the train, as it approached, and the evidence might have shown the contrary. But if the answers had shown the team to be in the position supposed by the eighteenth interrogatory, yet, although, as shown by another answer, the collision was caused by the fact that the horses were frightened by the train, it would not follow, because there was a strong probability that horses so situated would become frightened and unmanageable, that under all the circumstances not disclosed by the answers of the jury, but which might have been shown in evidence, the jury would not be authorized to find, as they did by their general verdict, that there was negligence on the part of the appellant and absence of fault on the part of the appellee.

The facts, that the place in which the horses and wagon stood was not a safe place for them, and that there was a strong probability, because of their situation, that the horses would be fright-

ened by an approaching train, might, with other supposable circumstances, strongly indicate fault on the part of the person in control of the team, and might also tend to exonerate the appellant from a charge of negligence, but, in the absence of knowledge of other controlling circumstances, these facts could not lead to any conclusion upon the question of negligence. * * *

There was no error in overruling the appellant's motion for judgment on the answers to interrogatories, notwithstanding the general verdict. * * *

CHAPTER V.

TRIALS BY THE COURT.

U. S. COMPILED STATUTES, 1913.

§ 1584. [R. S. § 648.] TRIAL OF ISSUES OF FACT BY JURY. The trial of issues of fact in the circuit courts shall be by jury, except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, and by the next section.

§ 1587. [R. S. § 649.] TRIAL OF ISSUES OF FACT BY THE COURT. Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.

HURD'S STATUTES OF ILLINOIS, 1913, CHAPTER 110.

[60. TRIAL BY COURT.] § 60. In all cases in any court of record in this State, if both parties shall agree, both matters of law and fact may be tried by the court.

[61. TRIAL BY COURT—SPECIAL FINDING.] § 61. Upon a trial by the court either party may, within such time as the court may require, submit to the court written propositions to be held as law in the decision of the case, upon which the court shall write "refused" or "held," as he shall be of opinion is the law, or modify the same, to which either party may except as to other opinions of the court. In any case so tried the court shall find specially upon any material questions or questions of fact, which shall be submitted in writing by either party before the commencement of the argument.

REVISED STATUTES OF MISSOURI, 1909.

§ 1968. ISSUES OF FACT TO BE TRIED BY JURY, WHEN. An issue of fact in an action for the recovery of money only, or

of specific real or personal property, must be tried by a jury, unless a jury trial be waived or a reference ordered as hereinafter provided. (R. S. 1899, § 691.)

§ 1970. JURY TRIAL, WHEN DEEMED WAIVED. Parties to an issue of fact shall be deemed to have waived a trial by jury in the following cases: First, by failing to appear at the trial; second, by written consent, in person or by attorney, filed with the clerk; third, by oral consent in court, entered on the minutes. (R. S. 1899, § 693.)

§ 1972. TRIAL OF QUESTION OF FACT BY COURT—DUTY AS TO FINDINGS. Upon the trial of a question of fact by the court, it shall not be necessary for the court to state its finding, except generally, unless one of the parties thereto request it with the view of excepting to the decision of the court upon the questions of law or equity arising in the case, in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law. (R. S. 1899, § 695.)

§ 1987. INSTRUCTIONS. When the evidence is concluded, and before the case is argued or submitted to the jury or to the court sitting as a jury, either party may move the court to give instructions on any point of law arising in the cause, which shall be in writing and shall be given or refused. The court may of its own motion give like instructions, and such instructions as shall be given by the court on its own motion or the motion of counsel shall be carried by the jury to their room for their guidance to a correct verdict according to the law and evidence; which instructions shall be returned by the jury into court at the conclusion of the deliberations of such jury, and filed by the clerk and kept as a part of the record in such case. (R. S. 1899, § 748.)

SECTION 1. WAIVER OF THE JURY.

KEARNEY v. CASE.

12 Wallace, 275. [*1870.*]

Error to the Circuit Court for the District of Louisiana; the case being this:

The act of Congress of March 3d, 1865, after presenting in its first two sections the manner in which grand and petit jurors

are to be selected and impaneled in criminal cases, proceeds in its fourth thus to enact:

"Issues of fact in civil cases in any Circuit Court of the United States may be tried and determined by the court without the intervention of a jury, whenever the parties or attorneys of record file a stipulation in writing with the clerk of the court waiving a jury." * * *

This statute being in force, Case, on the 13th of September, 1868, as receiver of the First National Bank of New Orleans, brought suit against Kearney on two promissory notes owned by the bank.

Without any agreement in writing filed to have the case tried under the above-quoted act of Congress, or any agreement in writing at all, so far as the transcript of the record showed, a trial was afterwards had by the court, which rendered judgments against the defendant on the 12th day of January, 1869.

Though, as above mentioned, no agreement to submit in writing appeared or was inferable, the record of the judgment showed that counsel were present on both sides when the trial was had. It ran thus:

"December 7th, 1868. This cause came up for trial—J. D. Rouse and Elmore and King, for plaintiff; J. G. L. Bright and Bradford, Lea, and Finney, for defendants—when, after hearing the pleadings, evidence, and argument, the court considering the same, it is ordered, adjudged, and decreed that Charles Case do recover, &c., &c."

A writ of error was applied for and obtained by the defendant, on the 28th of January, 1869, and filed on the same day; a citation being issued and served on that day. * * *

Mr. Justice MILLER delivered the opinion of the court.

No question arises on the process or pleadings; there is no bill of exceptions, and the plaintiff in error relies on what purports to be a statement of facts in the case to show the error of which he complains. * * *

The Judiciary Act of 1789, § 12, declares that the trial of issues in fact in the Circuit Courts shall, in all suits, except those of equity and of admiralty and maritime jurisdiction, be by jury. This provision and that found in the seventh amendment of the constitution, adopted after the Judiciary Act, namely, "that in suits at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," consti-

tuted the only legislative rule for the Federal courts, except in Louisiana, until the act of 1865. Undoubtedly both the Judiciary Act and the amendment to the constitution secured the right to either party in a suit at common law to a trial by jury, and we are also of opinion that the statute of 1789 intended to point out this as the mode of trial in issues of fact in such cases. Numerous decisions, however, had settled that this right to a jury trial might be waived by the parties, and that the judgment of the court in such cases should be valid. Notwithstanding, however, the number of cases in which the waiver of this right is mentioned, and either expressly or tacitly held to be no objection to the judgment, it is remarkable that so little is said as to the mode in which this waiver shall be made to appear. In most of the cases it is somewhere in the record stated affirmatively that the parties did waive a jury, or did consent to the trial by the court without a jury. In the case of Bank of Columbia v. Okely (4 Wheaton, 235), the court held that there was an implied waiver of this right when the defendant made his note negotiable at the Bank of Columbia, there being in the charter of that bank a provision authorizing the collection of such debts by a summary proceeding, which did not admit of a jury trial. In Hiriart v. Ballon (9 Peters, 156), where a summary judgment was rendered against a surety in an appeal bond, it was held that the defendant, by becoming surety in a court whose rules provided for such summary judgment, had waived his right to a trial by jury. It seems, therefore, that both by express agreement in open court, and by implied consent, the right to a jury trial could be waived. But as was shown in the recent case of Flanders v. Tweed (9 Wallace, 425), this court had held that no review of the decision of the court below could be had of any ruling at the trial where the parties had consented to accept the court, instead of a jury to decide issues of fact.

In this state of the law the act of 1865 was passed. The first two sections are devoted to prescribing the manner in which grand and petit juries shall be selected and impaneled in criminal trials. The fourth section enacts that issues of fact in civil cases, in any Circuit Court of the United States, may be tried and determined by the court without the intervention of a jury, whenever the parties or their attorneys of record file a stipulation in writing with the clerk of the court waiving a jury. It then proceeds to prescribe the mode of finding the facts, and

the effect to be given to such finding, and provides for a review of the case by this court. The manner in which the record is to be prepared for this and the extent of the inquiry in this court are specifically pointed out.

The question arises on this statute whether this mode of submitting a case to the court without a jury was intended to be exclusive of all other modes, so that if there is no stipulation in writing waiving a jury, there is error, for which the judgment must be reversed. Although the language of the section might admit of that construction, it is not the only one of which it is susceptible. As stated in the case already referred to, of Flanders v. Tweed, the main purpose of the act undoubtedly was to enable the parties who were willing to waive a jury to have the case reviewed on writ of error when tried by the court alone. This was rendered necessary, as shown by Mr. Justice Nelson in the opinion in that case, by the former decisions, based on the idea that in such cases the court did not sit as a court of law, but as *quasi* arbitrators. To remove this difficulty, the statute provided a mode by which the parties who agreed to waive a jury should have the benefit of a writ of error to the rulings of the court on questions of law. The language of the section is that the stipulation may be filed with the clerk of the court, which is undoubtedly designed to enable the parties to make agreements in vacation; and it is required to be in writing, to prevent either party demanding a jury unexpectedly at the trial. In those courts where juries are called from a great distance and detained at a heavy sacrifice, the courts usually give jury trials the preference. The benefit, therefore, of an announcement by which the number of these trials is diminished, and the case placed in an attitude to be taken up at the convenience of the court and the parties is obvious. We cannot believe that Congress intended to say that the parties shall not, as heretofore, submit their cases to the court unless they do so by a written stipulation, but that it was the intention to enact that if parties who consent to waive a jury desire to secure the right to a review in the Supreme Court of any question of law arising in the trial, they must first file their written stipulation, and must then ask the court to make a finding of such facts as they deem essential to the review, and ask the ruling of the court on points to which they wish to except. If this is not done the parties consenting to waive a jury stand as they did before the

statute, concluded by the judgment of the court on all matters submitted to it. This we understand to be the effect of the opinion in Flanders v. Tweed.

But, although a written stipulation in the Circuit Court is essential to a review in this court, is the presence of the agreement or its copy in the transcript sent here indispensable? A copy of it should come up, as observed by Mr. Justice NELSON, and that is the more appropriate evidence of compliance with the statute. Still we are not prepared to say that if it shall affirmatively appear in any other part of the record proper, that such a writing was made by the parties, that it will not be sufficient here. If, for instance, it is stated in the finding of facts by the court, or in the bill of exceptions, or in the record of the judgment entry, that such a stipulation was made in writing, the record would show that the condition in which a review is allowed existed, and we would not feel at liberty to contradict the record in this respect. In a case where there is no evidence that it was submitted in writing under the statute, but the record shows affirmatively that the parties waived a jury, we hold such evidence of waiver to be sufficient to support the judgment, but not sufficient to authorize a review of the rulings of the court at the trial. But the record before us contains no statement that the parties agreed in writing to submit the case to the court, nor any express statement that they waived a jury at all. The language of the judgment is that

"This cause came up for trial; J. D. Rouse and Elmer and King for plaintiffs; G. L. Bright and Bradford, Lea, and Finney, for defendants; when, after hearing the pleadings, evidence, and argument, the court considering the same, it is ordered, adjudged, and decreed," &c.

Is this court at liberty to infer from the entry a waiver of the right to a jury trial? When we consider the cases already cited, in which such a waiver has been implied, and that the right to have a jury when a party demands it is so universally known and respected, we think that it is almost a necessary inference, where a party is present by counsel and goes to trial before the court without objection or exception, he has voluntarily waived his right to a jury, and must be held in this court to the legal consequences of such a waiver. But we are not prepared to go further.

If the state of the pleadings presents issues of fact to be tried,

and there is nothing to show that the party complaining of the error was present by himself or counsel at the trial, and no jury was called, we think it is error for the court to try those issues without a jury, because there can be no presumption that the party has waived his legal and constitutional right to have a jury.

The record before us presents, in the light of these views, a case where the parties consented to waive a jury, but did not take the steps necessary to secure the right to a review of the findings of the court as provided by statute.

There is, therefore, no error of which we can take cognizance, and the judgment of the Circuit Court is

Affirmed.[1]

DILLY v. OMAHA & ST. L. RY. CO.

55 Missouri Appeals, 123. [*1893.*]

ELLISON, J. This action was instituted under the provisions of sections 2611 and 2612, Revised Statutes, 1889, wherein an action is given for damages to stock which may go upon a railroad right of way by reason of there not being a sufficient fence, and are injured in ways other than by colliding with the train. Judgment was given for plaintiff, both in the justice's court and the Circuit Court. Defendant has brought the case here. * * *

II. The next point of objection is based on the allowance of an attorney's fee of $35, under the provisions of section 2612, Revised Statutes, 1889. The trial court allowed the fee, without calling a jury, and without any waiver of a jury being entered by defendant as provided in section 2133. No objection was made to this by defendant, except by a motion in arrest. It was decided in Briggs v. Railroad, 111 Mo. 168, that a reasonable attorney's fee, as allowed by the statute aforesaid, was an issue of fact in the sense of the statute, section 2121, and that the parties were entitled to a jury, unless one was waived. It was furthermore decided in that case, that there could be no waiver, when the parties appeared, except by written consent filed with the clerk, or oral consent in court, entered on the minutes; and

[1] The sufficiency of the pleadings is open to review as in other cases. Bond v. Dustin, 112 U. S. 604.

that advantage could be taken of this by motion in arrest. No waiver, as contemplated by that decision, was made in this case, and we must hold under authority that error was committed against defendant. Plaintiff's counsel make a strong argument, with citation of authority, against this view, but we are bound, under the Constitution, to give the defendant the benefit of the last ruling of the Supreme Court.

The result is that we will affirm the judgment as to all things save that for the attorney's fee. As to the latter we will reverse the judgment and remand the cause for trial as to such fee. * * *

PHILLIPS v. HOOD.

85 Illinois, 450. [*1877.*]

Mr. Justice SHELDON delivered the opinion of the court:

The plaintiff in this suit recovered a judgment in the county court of Jefferson county, from which an appeal was taken by the defendant to the Circuit Court of the county, where the judgment was affirmed, and the defendant took the present appeal to this court. * * *

It is next objected that, in the county court, the cause was tried by the judge of that court without a jury, and that the record does not show that appellant waived his right to a jury, as it should have done, there being an issue of fact, according to Archer v. Spillman, 1 Scam. 553. The record shows the appearance of both the parties at the time, and in Burgwin v. Babcock, 11 Ill. 28, it was held, that in the case of such a trial, where the parties are present, and interpose no objections, they waive their right to have the cause submitted to a jury, and acquiesce in the trial by the court.

It is further insisted that the verdict is not sustained by the evidence. There is some conflict in the testimony, but we regard it as fully warranting the verdict.

Judgment affirmed.

WHEELOCK v. LEE.

74 New York, 495. [*1878.*]

RAPALLO, J. * * *

The appellant takes the further point that he was entitled to a trial by jury. The first four causes of action specified in the complaint are clearly triable by jury. They are for the recovery of money only, and maintainable at common law. (Palen v. Johnson, 50 N. Y. 49; Wheelock v. Lee, 64 id. 246.) The fifth cause of action only is for equitable relief, viz.: the surrender of the securities given for the usurious loans. The joinder of an equitable cause of action with others purely legal does not deprive the defendant of the right of trial by jury. (Bradley v. Aldrich, 40 N. Y. 511.) When such an action is brought to trial at special term and the defendant demands a jury trial, the judge must determine whether any of the grounds upon which a recovery is sought are such as at the adoption of the Constitution were redressed by an action at law, and if so should direct the cause to be tried by a jury at the circuit, or at all events should refuse to try the cause without a jury. (Davis v. Morris, 36 N. Y. 569, 572; Hudson v. Caryl, 44 id. 553.) Where the complaint is framed solely for equitable relief, and the action is tried as an action in equity, the court, on finding that the plaintiff is not entitled to any equitable relief, but that the facts would warrant an action for damages which he has not alleged or claimed, cannot order judgment for such damages. (Bradley v. Aldrich, 40 N. Y. 504.) An opportunity must have been afforded to the defendant to claim a jury trial on that ground of action.

The respondent claims that the appellant waived his right to a jury trial by consenting that the case be placed on the calendar for trial at the special term, and by noticing the case for trial at that term. We do not think these acts amounted to a waiver,—there was no consent that the action be tried without a jury and at the first opportunity the defendant demanded a jury trial. The case in one of its aspects was triable at special term, and had the plaintiff elected to rely solely on his equitable cause of action he could have proceeded with the trial there. In the cases cited above, this court gives a strong intimation that a trial by jury can be waived only in the manner prescribed by the Code, or by entirely failing to object, but it is not necessary to decide

that point now. It is sufficient to hold that at all events there must be some unequivocal act or consent showing an intention to abandon the constitutional right, and no such intention is apparent here.

Being of opinion that on both of the grounds stated the judgment must be reversed it is not necessary to consider the other points in the case.

Judgment reversed, with costs.

BURNHAM v. NORTH CHICAGO RY. CO.

88 Federal Rep. 627. [*C. C. A. 1898.*]

BUNN, District Judge. This suit has been twice tried in the court below, and is now in this court for the second time. It was brought to recover the price of a street-car traction motor constructed by the plaintiffs for the defendant. Upon the first trial a jury was waived, and the case submitted to the court upon the following written stipulation as to the facts, without other evidence:

"It is hereby stipulated by and between the parties to the above-entitled cause, through their respective counsel, that jury shall be, and is hereby, waived, and the said cause submitted to the court for trial upon the foregoing statement of facts. For the purpose of said trial, the said statement shall be considered by the court to be in evidence, and as absolutely true." * * *

On the second trial the plaintiffs asked for a jury trial, and also that they be allowed to introduce evidence in addition to, but not contradicting, the written statement,—both of which requests were denied by the court,—to which rulings exceptions were taken, and the trial had before the court upon the same stipulation of facts, and a finding and judgment rendered again against the plaintiffs.

We are of opinion that the court erred in each of these rulings. * * *

2. The stipulation to waive a jury, and to try the case before the court, only had relation to the first trial. There could be no presumption then that there would ever be a second trial; and therefore it should not be presumed that the parties, in

making the stipulation, had in mind any possible subsequent trial after the first, to which the stipulation could refer. The right of trial by jury in cases at law, whether in a civil or criminal case, is a high and sacred constitutional right in Anglo-Saxon jurisprudence, and is expressly guaranteed by the United States Constitution. A stipulation for the waiver of such right should therefore be strictly construed in favor of the preservation of the right. Cross v. State, 78 Ala. 430; State v. Fouchet, 33 La. Ann. 1154; Dean v. Sweeney, 51 Tex. 242; Brown v. Chenoworth, Id. 469; Town of Carthage v. Buckner, 8 Ill. App. 152. This last cited case was very similar to the one at bar, and the court says:

"It appears that on the first trial the parties entered into a written stipulation of facts agreed upon, as proven on the trial, and also that a jury should be waived, and the case submitted to the court for trial. On the second trial, appellant claimed that under such stipulation a jury should again be waived, and the case be tried by the court, and entered a motion to that effect. The action of the court in overruling this motion is one of the errors assigned. In this we think no error was committed. The agreement to waive a jury only bound the parties to the mode adopted—of trial by the court—to that one trial. When the case was remanded by this court for another trial in the court below, both parties were restored to their original right of trial by jury. Each party is entitled to as many juries as there are trials, and a waiver of a jury on one trial is expended by that trial." Brown v. State, 89 Ga. 340, 15 S. E. 462.

The rule and the reason for it are fairly laid down by the Supreme Court of Alabama in Cross v. State, 78 Ala. 430, as follows:

"We need not decide whether the defendant, under the facts of this case, so far waived his right of trial by jury as to justify the judge of the County Court in proceeding to try the cause. * * * Conceding that such was the case, all we decide is that the agreement to waive the right of trial by jury must ordinarily be construed to apply only to the particular trial at which it is made. Such a waiver is a renunciation of a valuable constitutional right, and must be strictly construed. It may well be supposed that a defendant would be perfectly willing for a particular judge to try him, when he would not risk his successor, or that he would be willing to be tried the first time by a judge, when he would not submit to a second trial by the same

judge after such officer had convicted him one or more times, so that the judicial mind might not afterwards be perfectly free from the influence of a bias created by the circumstances of such previous conviction. This would be sufficient ground for the challenge of a juror, and ought not to be considered as waived in the case of a judge,—at least on doubtful implication." Marton v. King, 72 Ala. 354; Stedman's Heirs v. Stedman's Ex'rs., 32 Ala. 525; Benbow v. Robbins, 72 N. C. 422.

Nor is this court ready to concede that the waiver of the right of jury trial is absolutely binding upon the party, even as to the one trial where it is intended to be applied. A stipulation to waive, followed by an order of the court, is not in the nature of a private contract founded upon a consideration, which can only be set aside for fraud. It is a proceeding in court, which is liable to be changed or modified or set aside by order of the court, in its discretion, upon a proper showing. And where the circumstances are changed, as in the case of a change in judges, or other conditions, such a discretion to relieve from a waiver might very properly be exercised even on the first trial.[1] A change in the court or in the counsel might very well furnish a good reason for allowing the waiver to be withdrawn; and where, upon a proper application, the circumstances seem to justify it, we think that a liberal discretion should be exercised by the trial court in allowing either party to withdraw from such a waiver, and to claim his right under the Constitution. The judgment of the Circuit Court is reversed, with instructions to grant a new trial.

SECTION 2. PROPOSITIONS OF LAW.

INSURANCE COMPANY v. FOLSOM.

18 Wallace, 237. [*1873.*]

Plaintiff brought assumpsit on a policy of marine insurance; defendant pleaded the general issue. A jury was waived by

[1] The court has discretion to relieve against a stipulation waiving a jury. Wittenberg v. Onsgard, 78 Minn. 342.

proper stipulation, and the case was submitted to the court which made a general finding for the plaintiff.[1]

Mr. Justice CLIFFORD. * * *

Having introduced the policy, the plaintiff proved by the master that the schooner, on the sixth of January prior to the date of the policy, departed on her voyage, and that she was lost at the time and by the means before stated. In addition to the incidents of the loss, he also proved the circumstances under which the master and crew were saved from the wreck and carried to the port of Bremerhaven, by the vessel which rescued them; that the master wrote to the owner by the first mail from that place after their arrival there, and that he was unable to use the telegraph, as he had no funds to prepay a telegram. Due notice of the loss and of the interest of the plaintiff having been admitted the plaintiff rested, and the defendants moved the court to decide that the evidence was not sufficient to entitle the plaintiff to a verdict, which the court refused to do.

Suppose the motion is regarded as a motion for a nonsuit, it was clearly one which could not be granted, as it is well-settled law that the Circuit Court does not possess the power to order a peremptory nonsuit against the will of the plaintiff. Power to grant a peremptory nonsuit is not vested in a Circuit Court, but the defendant may, if he sees fit, at the close of the plaintiff's case, move the court to instruct the jury that the evidence introduced by the plaintiff is not sufficient to warrant the jury in finding a verdict in his favor, and it is held that such a motion is not one addressed to the discretion of the court, but that it presents a question of law, and that it is as much the subject of exceptions as any other ruling of the court in the course of the trial. All things considered the court is inclined, not without some hesitation, to regard the motion as one of the latter character, and in that view it presents the question whether by the terms of the policy, the risk was within it, as the proofs show that the loss occurred before the policy was issued. * * *

Viewed in the light of these suggestions, it is quite clear that it would have been error if the Circuit Court had decided as requested by the defendants, and that the decision made by the Circuit Court in denying the motion was correct. * * *

Special findings of fact were requested by the defendants, and they excepted in numerous instances to the rulings of the court

[1] Statement has been condensed.

refusing to comply with such requests, all of which are overruled upon the ground that the finding of the Circuit Court upon the facts may be either general or special, as heretofore more fully explained. Requests that the court would adopt certain conclusions of law were also presented by the defendants, in the nature of prayers for instruction, as in cases where the issues of fact are tried by a jury, which were refused by the Circuit Court, and the defendants also excepted to such refusals. None of these exceptions have respect to the rulings of the court in admitting or rejecting evidence, nor to any other ruling of the Circuit Court which can properly be denominated a ruling in the progress of the trial, as every one of the refusals excepted to appertain to some request made to affect or control the final conclusion of the court as to the plaintiff's right to recover. Such requests or prayers for instruction, in the opinion of the court, are not the proper subjects of exception in cases where a jury is waived and the issues of fact are submitted to the determination of the court. Exceptions are allowed to the rulings of the court in the progress of the trial, and the provision is that the review, if the finding is special, may also extend to the determination of the sufficiency of the facts found to support the judgment. Where the finding is general, as in this case, nothing is open to review but the rulings of the court in the progress of the trial, and as none of the last-named exceptions, which are the ones now under consideration, were of that class, they are all overruled. Like a special verdict, a special finding furnishes the means of reviewing such questions of law arising in the case as respect the sufficiency of the facts found to support the judgment, but where the finding is general the losing party cannot claim the right to review any questions of law arising in the case, except such as grow out of the rulings of the Circuit Court in the progress of the trial, which do not in any proper sense include the general finding of the Circuit Court nor the conclusions of the Circuit Court embodied in such general finding, as such findings are in the nature of a general verdict and constitute the foundation of the judgment. No review of such a finding can be made here under a writ of error, unless it is accompanied by an authorized special statement of the facts, without imposing upon this court the duty of hearing the whole case, law and fact, as on an appeal in a chancery or in an admiralty suit, which would operate as a repeal of the provisions in the act of congress, that issues of fact in

such cases may be tried and determined by the Circuit Court, and would also violate that clause of the twenty-second section of the Judiciary Act, which prohibits this court from reversing any case "for any error of fact."

Whether any ruling of the Circuit Court other than the rulings in admitting or rejecting evidence can properly be regarded "as rulings in the progress of the trial," within the meaning of that phrase in the act of congress, it is not necessary in this case to decide, as it is clear that neither the general finding of the Circuit Court nor the conclusions of the Circuit Court as embodied in the general finding fall within that category.[2]

Judgment affirmed.

HUBBARD v. FUCHS.

164 Missouri, 426. [*1901.*]

BURGESS, J. * * *

This an action at law, in which the evidence was conflicting, and no finding of facts was made by the court, nor were any declarations of law asked, or given. It is impossible, therefore,

[2] Compare St. Louis v. Telegraph Co., 166 U. S. 388. See comments on these cases in Streeter v. Sanitary Dist., 133 Fed. (C. C. A.) 124.

MUNGER, J., in Seep v. Mining Co., 201 Fed. 893:

"These statements of the mode in which the judgment of the court, in an action at law when a jury has been waived, may be reviewed, seem plain and specific. All that it is necessary for counsel to do in the trial of an action at law to the court, when a jury is waived, is to bear in mind that the judge trying the case is acting in a dual capacity: First, as a trier of questions of law, the same as if the case were being tried to a jury; second, as a trier of facts, in the place of a jury. If the case was tried to a jury, to enable the appellate court to pass upon the question as to whether or not there is substantial evidence to sustain a finding in favor of a party, it is necessary to request the court to direct a finding. Upon the court's refusal, and an exception being taken, that question may be reviewed. So, too, when a case is tried to a court without a jury.

"* * * So, when a case is tried to the court, requests should be made to the court to find and announce the propositions of law which it is claimed are applicable to the facts in the case. If the court refuses to so find, and an exception is taken, the questions may be reviewed in the appellate court; or, if the court makes findings of law, and they are duly excepted to, they may be reviewed."

for us to determine upon what theory of the case it was decided, or whether correctly or otherwise, but the presumption must be indulged in favor of its correctness. As was said in the case of Sells v. Bretelle, 162 Mo. 373, and Blankenship v. Dilley, 162 Mo. 338: "If plaintiffs had desired to take the opinion of the trial court upon the questions which they now present upon this appeal, they should have asked declarations of law in accordance therewith," but having failed to do so they can not treat the case here just as if the questions which they now discuss had been raised by declarations of law either given or refused.[1]

Now, if there was no evidence to justify the judgment, this court would interfere although no declarations of law were asked (Hartt v. Leavenworth, 11 Mo. 629; Robbins v. Phillips, 68 Mo. 100; Pipkin v. Allen, 24 Mo. 520; Heyneman v. Garneau, 33 Mo. 565; Morris v. Barnes, 35 Mo. 412; Wilson v. Albert, 89 Mo. 537; State ex rel. v. Guinotte, 156 Mo. 513), but such is not the case. So it has been held by this court that it will review the action where exceptions are saved on points of law other than the giving or refusing of instructions (Wilson v. Albert, *supra*, and authorities cited), but no such question is presented by plaintiffs' brief.

For reasons indicated we affirm the judgment.

FIRST NAT'L BANK v. N. W. NAT'L BANK.

153 Illinois, 296. [*1894.*]

Mr. Justice BAKER delivered the opinion of the court:

In this action of assumpsit brought by the Northwestern National Bank of Chicago, against the First National Bank of Chicago, the issues were tried before the Superior Court of Cook county without a jury, and the court found the issues for the plaintiff, and assessed its damages at $2454, and rendered judgment therefor against the defendant. Upon an appeal to the Appellate Court for the First District the judgment was in all things affirmed, and thereupon the First National Bank of Chicago prosecuted this further appeal.

A preliminary question is raised by the appellee. It insists

[1] Accord, Crean v. Hourigan, 158 Ill. 301.

that all questions of fact are conclusively settled in its favor by the judgment of affirmance in the Appellate Court, and further, that no questions of law are so preserved in the record as that they can be reviewed in this forum.

At the trial, appellant submitted to the court eight "written propositions," which it prayed should "be held as law in the decision of the case." (Sec. 41 of Practice act, 2 Starr & Curtis' Ann. Stat. 1808.) The court "held" propositions 1, 2 and 3, but "refused" to hold propositions 4, 5, 6, 7 and 8 to be law applicable in the decision of the case, and to the action of the court in refusing to hold said five last mentioned propositions, and each of them, appellant then and there excepted.

In respect to propositions 4, 5, 6 and 7, it may well be said that they are not propositions of law, within the intent and meaning of Section 41 of the Practice act. They are, both in form and in substance, mere prayers or solicitations of appellant to the trial court to find particular facts for it, "under the law and the evidence." The statute does not contemplate that under the cloak of written propositions of law a party litigant shall have the right to call upon the court to find in his or its favor, *seriatim*, all the special or particular facts involved in the evidence; and, *dehors* the statute, it is not a common law function of a judge, in a common law action, to make special findings of fact. The rule is, *ad quaestionem facti non respondent judices.* Broom's Legal Maxims (4th ed.), 103; Altham's case, Coke, part 8, 155a. In Memory v. Niepert, 131 Ill. 623, the case was tried by the court below without a jury, and this court held that a proposition there asked was properly refused, and for the reason that no question of law was thereby raised. And so in the case at bar, the trial court could not properly have done otherwise than refuse to hold the propositions 4, 5, 6 and 7.

The trial court also declined to hold proposition 8 tendered by appellant, and marked the same "refused." That proposition read as follows: "The court holds, as a matter of law, that under the law and evidence the judgment in this case should be for defendant." There can be no question but that if the case had been on trial before a jury, and appellant had moved the court to instruct the jury that under the law and evidence, and as matter of law, the verdict and judgment in the case should be for the defendant, then such motion would have been regarded as a motion in the nature of a demurrer to the evidence, and as raising

a question of law for the decision of the court. In Bartelott v. International Bank, 119 Ill. 259, it was held that motions to exclude the entire evidence from the jury, and motions to instruct the jury to find for the defendant, are in the nature of demurrers to evidence, and that they admit not only all that the testimony of the plaintiff proves, but also all that it tends to prove. And it was also there held, that a motion to exclude the evidence, or to instruct the jury that they should find for the defendant, may be made after the evidence is heard on behalf of the defendant. To like effect is the case of Joliet, Aurora and Northern Railway Co. v. Velie, 140 Ill. 59. In cases where the parties litigant agree that both matters of law and matters of fact may be tried by the court without a jury, and the only question at issue is the question of law whether the uncontroverted facts constitute a cause of action, no good reason is perceived why the defendant may not submit to the court such a proposition as proposition 8 now before us, to be "held" or "refused" by the court, as the court shall be of opinion the law of the case is, and why the submission of such a proposition should not be regarded as in the nature of a demurrer to evidence, and as sufficiently raising and preserving the question of law involved for re-examination in a court of review.

The exact question now before us does not seem ever to have been passed upon by this court. But the case of Pittsburg, Ft. Wayne and Chicago Railroad Co. v. Reich, 101 Ill. 157, was tried by the court without the intervention of a jury, and upon the appeal of this court, in discussing the several propositions of law that were refused at the trial, used this language in regard to one of them: "The fourteenth proposition was properly refused, because there was evidence tending to sustain a cause of action. It asserts, simply, that under the evidence there can be no recovery. There was evidence tending to authorize a recovery. Its weight was for the court." The plain implication from this language is, that the propriety of holding or refusing a written proposition such as that now before us, will depend upon the answer given to the question whether or not there is evidence in the record which fairly tends to establish a cause of action.[1]

[1] MACFARLANE, J., in Butler Co. v. Boatmen's Bank, 143 Mo. 13:

"From a judgment for defendant plaintiff appealed.

"A jury was waived and the issues of fact were submitted to the judge, who in that respect performed the duties of a jury. In

The conclusion to be deduced from that which we have said is, that we consider this case properly before use for the consideration of the question, as a question of law, whether the evidence tends to show a right of recovery in appellee. * * *

CRERAR v. DANIELS.

209 Illinois, 296. [*1904.*]

Mr. Justice RICKS: * * *

Complaint is made of the refusal of the court to mark "held" eleven alleged propositions of law submitted to it. The first proposition was: "The court finds that the planks, planking, stringers, and surface improvements in question in this case were fixtures." The second is in the same language, and asks the court to hold that they are trade fixtures. By the third the court was asked to hold that the "plaintiff surrendered possession of the dock in question on the date of the expiration of his lease, and that the planks, planking, stringers and surface improvements in question, at the time the premises were surrendered by the plaintiff, had not been removed or attempted to be removed by the plaintiff." The fourth asked the court to hold that the same materials designated in the previous instructions were annexed to the realty, were adapted for the use or purpose of the realty to which they were attached, and were intended by the plaintiff to be annexed to the realty. By the fifth the court was asked to hold that the property sued for had no such market value, in law, as entitled the plaintiff to recover against defendants. The

such case the finding of facts by the judge are as conclusive upon the appellate court as the verdict of a jury, and will not be reviewed. But in such a trial either party has the right to have the judge declare the theory of law by which he is governed in reaching the conclusion of fact. This is done in the form of declarations of law, which are analogous to instructions given to juries and which are subject to review by the appellate court in like manner and with like effect.

"* * * The court does not declare a conclusion of fact, or of law and fact, but a legal conclusion 'that under the pleadings and evidence in the case the plaintiff is not entitled to recover.' This is a declaration of law given by the court, and not a finding of fact by the judge sitting as a jury."

sixth was, that such property, located as it was, had no market value. The seventh was, that the defendants leased the realty in question and took possession thereof with the property claimed upon the same, and that plaintiff had no right, against the defendants, to enter upon the realty and take possession of and remove said property.

We have set out enough of these propositions that their real character may be seen, and it is quite apparent that none of them are propositions of law, but are simply requests to the court to make certain specific findings of facts involved in the consideration of the case. By Section 41 of the Practice act either party is authorized to "submit to the court written propositions to be held as law in the decision of the case." This provision of the statute authorizes the offering of propositions of law to be passed upon by the court, so that questions of law arising in the case as to the applicability, force and effect of the evidence may be preserved and passed upon by courts of review. They are termed propositions of law to be held or refused by the court, in contradistinction to the instructions that are to be presented and given for the guidance of juries, but so far as their substance and form is concerned they must in all material respects be the same. Any form of stating a proposition of law that would not be proper in an instruction to a jury would likewise be improper when offered to the court trying a cause in the absence of a jury. Such propositions should state the law, only, and not assume a state of facts existing or attempt to find a given fact or state of facts. They should be framed upon a hypothesis which there are facts in the record tending to establish, and should ask the court that if those facts are found by the court, the law applicable to those facts is as stated in the propositions. As we said in First Nat. Bank v. Northwestern Nat. Bank, *supra* (p. 301): "The statute does not contemplate that under the cloak of written propositions of law a party litigant shall have the right to call upon the court to find in his or its favor, *seriatim*, all the special or particular facts involved in the evidence; and, *dehors* the statute, it is not a common law function of a judge, in a common law action, to make special findings of fact."

In County of La Salle v. Milligan, 143 Ill. 321, we said (p. 345): "Proposition 13, submitted by appellant, was properly refused. By it the court was required to hold as a fact that

the sheriff had 'collected from sources other than the county, during each year of his term as sheriff, fees in excess of the salary or compensation allowed him by the board.' The fact is not stated hypothetically and the opinion of the court as to the law arising thereon asked, as may be done where the hypothesis assumed finds support in the evidence, but the court, if it held the proposition, was compelled to assume the fact as established. This is improper. The purpose of the statute is to enable the party to submit propositions with a view to obtaining the opinion of the court upon material and controlling principles of law only, and when the proposition calls for the opinion of the court upon a question of fact it may properly be refused. For aught we can know or are required to know the court found the fact directly at variance with the proposition."

The last remark of the court in the above quotation is quite applicable to the case before us. It is evident from the judgment of the court that upon all the questions of fact proposed by the appellants the court entertained a different view to that requested to be held. The views herein above expressed are but the reiteration of the declarations of this court in Gilbert v. Sprague, 196 Ill. 444; O'Flaherty v. Mann, id. 304; In re Tobin, id. 484; Field v. Crawford, 146 id. 136; Board of Supervisors v. Commissioners of Highways, 164 id. 574; Order of Foresters v. Schweitzer, 171 id. 325.

Whether the plank and stringers for which recovery is sought in this case were personal property, or whether they were trade fixtures which might be removed by the tenant, or whether they had become attached to and a part of the realty and passed with the lease to appellants, were questions of fact, in determining which appellants were entitled, if they wished, to have the legal effect of any state of facts appearing in evidence passed upon by the court by propositions of law submitted for that purpose. The trial court found that the property sued for was personal property, for which recovery could be had, and gave judgment accordingly, and as the Appellate Court affirmed the judgment of the trial court we must presume that it found the facts the same way. There being, then, no further propositions or questions of law presented for our consideration, it becomes our duty to affirm the judgment of the Appellate Court, which is accordingly done.

Judgment affirmed.

HUDSON v. WRIGHT.

204 Missouri, 412. [*1907.*]

LAMM, J. Sarah A. Hudson lodged her bill in equity against her husband, Jacob I., and one Jubal A. Wright, having for its object, first, to set aside a sheriff's deed dated September 14, 1902, conveying to said Wright the interest of said Jacob I. in and to a described part of the northeast quarter of the northeast quarter of section 4, township 56, range 32, in Clinton county; second, to vest the fee of said land in her. The decree, *nisi*, went in her favor—Hudson abiding the event of the trial, but Wright appealing here. * * *

III. Error is assigned in the refusing of appellant's declarations of law. But instructions fill no office in equity practice—*ergo*, are out of place in this case. The question here is not what views the chancellor may have had on the law—the heart of the matter is: Did the decree do equity? And that is the impelling question we must seek out an answer to on appeal, and none other. (Bouton v. Pippin, 192 Mo. l., c. 474, *et seq.*) There is no merit in this assignment of error.[1]

SECTION 3. SPECIAL FINDINGS.

BRITISH QUEEN MINING CO. v. BAKER MINING CO.

139 U. S. 222. [*1890.*]

Mr. Chief Justice FULLER delivered the opinion of the court.

This case was tried by the Circuit Court, without a jury, and under sections 649 and 700, Rev. Stat., the finding must be "either general or special." It cannot be both. Here there was a general finding.

[1] And so in probate matters where there is no right to a jury—MR. JUSTICE CARTWRIGHT, in Marin v. Martin, 170 Ill. 18: "As there was no right to a jury trial, section 41 of the practice act does not govern, and it was not necessary to submit propositions of law. As the proceeding is governed by equitable principles and practice, the facts are still open to investigation in this court, and it was not necessary that

The record contains a bill of exceptions, but no exceptions to the rulings of the court in the progress of the trial of the cause were thereby duly presented, and although after reciting the evidence it is therein stated that "the court thereafter and during the said term made the following findings of fact and judgment thereon," which is followed by an opinion of the court assigning reasons for its conclusions, this cannot be treated as a special finding enabling us to determine whether the facts found support the judgment, nor can the general finding be disregarded. Dickinson v. Planters' Bank, 16 Wall. 250; Ins. Co. v. Folsom, 18 Wall. 237; Norris v. Jackson, 9 Wall. 125; Flanders v. Tweed, 9 Wall. 425; Ins. Co. v. Tweed, 7 Wall. 44; Miller v. Life Ins. Co., 12 Wall. 285; Ins. Co. v. Sea, 21 Wall. 158; Martinton v. Fairbanks, 112 U. S. 670; Raimond v. Terrebonne Parish, 132 U. S. 192; Glenn v. Fant, 134 U. S. 398; Lloyd v. McWilliams, 137 U. S. 576.

The record raises no questions open to revision by us and the judgment is

Affirmed.[1]

BERGER v. VARRELMANN.

127 New York, 281. [*1891.*]

FOLLETT, Ch. J. The judgment which the appellant obtained by the confession of his debtors is sought to be set aside and the money collected by virtue of it recovered for the benefit of the creditors of the judgment debtor, on the ground that when confessed the confessors intended to make a general assignment and prefer the claim of the appellant through a judgment and execution, and thereby evade the prohibition of the thirtieth section of the Assignment Act, which is as follows: * * *

The appellant insists that his judgment and execution by which he secured more than one-third of the estate of the insolvent

the appellate court should recite in its judgment a finding of facts. The sections of the practice act relied upon do not apply to cases of this kind. Moore v. Tierney, 100 Ill. 207."

The provision for special findings is not applicable to equity cases. Pitts v. Pitts, 201 Mo. 356.

[1] See also U. S. v. Sioux City Stock Yards, 167 Fed. 126.

debtors are not brought within the prohibition of the section, because: (1) The trial court did not find as a fact that the debtors contemplated making a general assignment when the judgment was confessed. (2) The trial court did not find as a fact that the appellant knew when he received the confession of judgment and seized the property by virtue of the execution issued thereon that the debtors contemplated making a general assignment. (3) The preference was not created in the general assignment, but by a separate instrument. * * *

The trial court found that the estate of the assignors was not worth three times the amount of the appellant's judgment, and that its collection consumed more than one-third of it, and that when the judgment was confessed, execution issued and levied and the assignment executed, the assignors and George E. Varrelmann all knew that the sale under the execution to be issued would absorb more than one-third of the debtors' assets. The decision signed by the trial judge contains seventeen findings of fact and seven conclusions of law. The first and second of the latter are as follows:

"First. The judgment confessed in favor of the defendant George E. Varrelmann, and the execution and levy which followed were made by the defendants Henry Erdtmann and Gustave Varrelmann, in contemplation of their general assignment and as part thereof, and for the purpose of preferring said defendant, George E. Varrelmann, in whose favor the said judgment was confessed by them, out of their property, for more than one-third of the net assets of the said defendants, Henry Erdtmann and Gustave Varrelmann, and to prevent the said assets from going into the hands of the defendant Kracht, as assignee, and being distributed to the plaintiffs, and the other creditors of the said defendants, Henry Erdtmann and Gustave Varrelmann, pursuant to the terms of their general assignment deed.

"Second. Said confession of judgment and the execution and levy which followed were made in fraud of the said general assignment, and are void, and should be set aside and vacated, and the assets levied upon, or the entire proceeds thereof, should be paid the defendant Kracht, as assignee, to be distributed pursuant to the terms of the deed of general assignment."

The learned counsel for the appellant insists that these conclusions cannot be given the effect of findings of fact, but must

be held to be conclusions of law, and that the facts so found cannot be considered on this appeal. This contention is not well founded, for it is well settled that though a "finding of fact" be called a "conclusion of law" and improperly classified as such in the decision signed (Code C. P. § 1022), it will, for the purpose of upholding a judgment, be given the same effect as though embraced within and designated as one of the findings of fact. (Parker v. Baxter, 86 N. Y. 586; Murray v. Marshall, 94 id. 611; Adams v. Fitzpatrick, 125 id. 124.)

The facts found in the conclusions of law above quoted—that the assignors confessed the judgment in contemplation of making a general assignment as a part thereof, and for the purpose of preferring George E. Varrelmann for more than one-third of their estate, that the confession of judgment, the execution and levy were made in fraud of the general assignment will be given the same force in support of this judgment as though they had been properly classified in the decision signed. * * *

DEMMING v. WESTON.

15 Wisconsin, 236. [*1862.*]

By the court, DIXON, C. J. Action commenced before a justice of the peace to recover damages for the conversion of a quantity of barrel hoops, the property of the plaintiff, of the alleged value of $18.50. Oral answer, denying each and every allegation of the complaint. Judgment for the defendants before the justice, and appeal by the plaintiff to the municipal court of the city and town of Ripon. * * *

* * * It was afterwards tried before the court without a jury, and judgment rendered for the plaintiff. The finding, so far as it related to facts and conclusions of law, omitting formal parts, is in these words: "The court finds that the defendants converted the property, and that a judgment be entered for the plaintiff against the said defendants for the sum of eighteen and fifty-hundredths dollars, damages and costs." To this the defendants excepted, as insufficient in the facts found and statements of legal conclusions. * * *

The finding is altogether defective. No fact whatever is found except that "the defendants converted the property," but what

property, its value, and whether it belonged to the plaintiff, we are not informed with that certainty which the law requires. And the conclusion of law, if finding "that a judgment be entered for the plaintiff" can be said to be one, is very vague, and not separately stated. R. S., Chap. 132, § 19. The facts found by the judge in such cases, are in the nature of a special verdict by the jury (9 Wis. 492), and should be stated with such fullness and accuracy that the court can see that the judgment is supported by them.

A very general finding may do, if it come within this rule, and it may be sufficient perhaps, if it refers to the complaint or other pleading containing a complete statement of the facts found. But here is nothing of the kind—neither a written statement of the facts found, nor a reference to other papers from which they can be ascertained.

The judgment must for these reasons be reversed, and the cause remanded for further proceedings according to law.

MURPHY v. BENNETT.

68 California, 528. [*1886.*]

BELCHER, C. C. This is an appeal by the plaintiff from a judgment in favor of the defendant, and it comes here on the judgment roll. The only question presented is as to the sufficiency of the findings.

The action was commenced to recover damages from the defendant for tearing down a barn, and converting the materials thereof to his own use.

The complaint alleged that the plaintiff was the owner of the barn, and in the lawful and peaceable possession of the land on which it was situated, and that on or about the ninth day of October, 1880, the defendant, without right or authority, and against the will of the plaintiff, willfully and maliciously tore down the said building, and removed the whole of it from the premises where it stood, and converted the same to his own use.

The answer denied that the plaintiff was at the times named in the complaint, or at any time, the owner of the barn, or in possession of the premises on which it was situated, and then set up two affirmative defenses.

The court found that the plaintiff was at the times mentioned in his complaint in the lawful and peaceful possession of the half-section of land on which the barn was alleged to have been situated, and then,—

"That the plaintiff was not the owner of the frame building situate on the tract of land described in his complaint at the time the same was torn down and removed by the defendant.

"That the defendant was the owner of said building at the time he tore the same down and removed it."

There was no finding upon the affirmative matters set up in the answer.

It is insisted for the appellant that the findings above quoted are not findings of fact, but conclusions of law, and that for want of findings upon the affirmative matters the judgment must be reversed.

Findings should be statements of the ultimate facts in controversy, and not of probative facts, or mere conclusions of law. (Matthews v. Kinsell, 41 Cal. 514; Pico v. Cuyas, 47 Cal. 174.)

Findings of probative facts are sometimes held sufficient, but only when the ultimate fact necessarily results from the probative facts. (Downing v. Graves, 55 Cal. 544; Biddel v. Brizzolara, 56 Cal. 381.)

The facts should be found, and not mere conclusions of law stated.

But a finding "that the plaintiff did not own the several tracts of land described in the several answers of defendants, but that the defendants owned the same in severalty, as set forth in their answers," has been held sufficient to support the judgment in an action of ejectment. (Smith v. Acker, 52 Cal. 217.)

So a finding that the defendant "has a good and perfect title to said property" has been held sufficient. (Frazier v. Crowell, 52 Cal. 399.)

So a finding "that the plaintiff was the owner and in possession of the property on the day that the defendant seized upon it, and removed it from her possession, custody, and control," has been held sufficient in an action to recover damages for the conversion of personal property. (Haley v. Nunan, 11 Pac. C. L. J. 523.)

There should be findings upon all the material issues in the case, but a judgment will not be reversed for want of a finding on a particular issue, where it is apparent that the failure to

find on that issue is in no way prejudicial to the appellant. (Porter v. Woodward, 57 Cal. 535; McCourtney v. Fortune, 57 Cal. 617; People v. Center, 66 Cal. 551.)

Here the allegation in the complaint is that the plaintiff "was the owner of a certain frame building, situate," etc.

The answer denied that the plaintiff was the owner of the building. Whether the plaintiff did own the building or not was, then, the ultimate fact to be determined, and upon the issue thus raised, the court found against the plaintiff.

We think it clear that the findings referred to are findings of fact, and not conclusions of law.

This being so, we are unable to see how the plaintiff is prejudiced by the failure of the court to find upon the affirmative defenses set up in the answer, as, if the plaintiff was not the owner of the building, it is of no moment whether the defendant justified his taking of it, or not.

In support of his position that he was entitled to findings upon the affirmative defenses, counsel for appellant cites Billings v. Everett, 52 Cal. 661. But that case is not in point. There the defendant set up an affirmative defense, and without any finding upon it, judgment was given in favor plaintiff. This court held, in effect, that if the facts set up in the answer were true, they constituted a defense to the action, and that no judgment could properly be rendered in favor of plaintiff until there was a finding as to whether they were or were not true.

The judgment, we think, should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

The court. For the reasons given in the foregoing opinion, the judgment is affirmed.

THORNTON, J., dissenting. I dissent. The finding that plaintiff was not the owner of a building, but that the defendant was, is neither a finding of an ultimate nor probative fact, but a general verdict reached by application of rules of law to the facts found. Whether A is the owner of certain property is a mixed question of law and fact. Such an issue, when contested, can only be determined after a trial in which evidence is introduced and the law applied to the facts found. When tried before a jury, they should be, and usually are, instructed as to the rules of law to be applied to the facts which they find to exist. The court usually instructs the jury as to every phase which the case may assume upon the evidence before them, and are, or should

be, told the rules of law which should govern them in their deliberations, and be applied to the facts as they find them to exist. Facts, then, as it was said by Justice BLACK, are "the raw material of verdicts." Verdicts are elaborated from them. A general verdict is synthetic—a compound of law and fact. The special verdict is analytic. It finds the facts, and submits the law to the court. Such a verdict concludes by a statement that as they (the jury) are ignorant of the law, they find the facts as set forth in the verdict, and submit the questions of law arising on them to the court, and if the court should be of opinion that, on the facts found, the law is for the plaintiff, they find for the plaintiff, and if for defendant, they so find. (Stephen on Pleading, *91; Abbott's Law Dict., tit. Verdict.) The naked facts, as Blackstone styles them (3 Bla. Com. 377), are alone found, from which every element of law is eliminated. These facts are the ultimate facts; and are the facts separated from the law on which the rights of the parties are to be determined. The jury did this,—refrained from finding the law,—that they might escape an attaint for a false verdict. (See Emeric v. Alvarado, 64 Cal. 603-605.)

How can it then be said that a finding that A is the owner of property is a finding of a fact, when this can only be determined in the case of a contest, after hearing all the evidence, determining which facts exist, and applying to them the rules which the law furnishes for the admeasurement of the rights of the parties? The facts must be so found that the appellate court may see that they warrant the conclusion of law reached and the judgment entered; that the judicial mind may perceive that the rules of law, on being applied to the facts found, lead to the conclusion of law and judgment arrived at.

The mind of the court is not called on to act at all when the finding is that the plaintiff is not the owner of the property sued for, but that the defendant is. If this is a proper finding of the facts, the duty of the court becomes wholly that of a servant bound to obey, and must enter judgment as on a general verdict. In fact, the verdict is a general one. A general verdict is one which the jury finds in the terms of the issue. (Abbott's Law Dict., tit. Verdict.) Here the finding is in such words. Coke, illustrating this point, says: "There be two kindes of verdicts, viz., one generall, and another at large or especiall. As in an assize of *novel disseisin*, brought by A against B, the plain-

tife makes his plaint, *Quod* B *disseisivit cum de 20 acris terrae cum pertinentiis;* the tenant pleades, *Quod ipse nullam injuriam seu disseisinam praefato* A *indefecit,* etc. The recognitors of the assize doe finde, *Quod praedict* A *injuste & sine judicio disseisivit praedict* B *de praedict 20 acris terrae cum pertinent,* etc. This is a general verdict." (2 Co. Lit. 226 b.) If the finding by the jury that "the aforesaid A unjustly and without judgment [right] disseised the aforesaid B from the aforesaid twenty acres, with their appurtenances," is a general verdict, why is not a finding that "the plaintiff is the owner of the thing sued for" a general verdict? (Stephens v. Westwood, 25 Ala. 716; Chedotoner v. Dominguez, 7 Mart. 521; Gonzalez v. Leon, 31 Cal. 98; Mendelsohn v. Anaheim, etc., Co., 40 Cal. 657; Downing v. Bourliek, 21 Mo. 149; Allison v. Darton, 24 Mo. 343; Bailey v. Wilson, 29 Mo. 21; Foster v. Jackson, Hob. 52-56.) I can perceive no difference. The one verdict, as the other, is compounded of law and fact, and the facts are not separated from the law, as is the case in a special verdict; and the court, on such verdict, has no discretion in entering judgment. The judgment must follow the verdict.

Now, the court in the case under consideration was bound to find the facts separately from its conclusions of law. Such is the statute. (Code Civ. Proc., § 638.) This is done for the reason indicated above,—that a court may examine the facts found, and see that they justify the conclusions of law and judgment pronounced on them.

The statute is intended *inter alia* to furnish a criterion or test by which to determine whether the court below has applied the law correctly to the facts found. In the case of the finding here, the court has nothing to which to apply this test. If the finding is a proper one, the court below has conclusively determined it, and this court is furnished with nothing by which it can determine whether the proper rules of law have been applied or not. The record as to the data on which to determine such question is an utter blank. This court must determine blindly whether the court below has ruled correctly or not. By adopting the findings as correct, the parties are deprived of a safeguard which the law intended to supply to them, viz., such a setting forth of facts in the findings that the appellate tribunal may see by looking at the facts found that the court below did not err in its legal conclusions. On what does the judgment of

this court operate, in examining a finding which says that the plaintiff is not the owner of a certain house, and the defendant is the owner? There is clearly nothing in such a finding for the judicial mind to take hold of.

Nor is such a finding a probative fact. A probative fact is a fact which proves or tends to prove something. It is an evidential fact. What is to be proved when it is said that A is the owner or B is not the owner? The result has been reached, and no evidence is required.

This court may have the right under the constitution as an appellate tribunal to infer one fact from another in a special verdict, or a finding of facts, where the result is determined by a fixed and certain rule of law. Otherwise, when it infers one fact from another fact, it is exercising original jurisdiction, and assuming a power which has not been conferred on it. This it is always bound to avoid.

I cannot agree that the facts are properly found herein, and in my opinion, the judgment should be reversed, and the cause remanded for a new trial.[1] * * *

[1] See Ins. Co. v. Trust Co., 71 Fed. 88.

CHAPTER VI.

NEW TRIALS.

SECTION 1. GROUNDS.*

ANONYMOUS.

14 Henry VII, 1 (3). [*1499.*]

In the common bench a jury was charged, and gave a verdict for the plaintiff. And now Kingsmill came to the bar and said that, after the jury was charged, and before the verdict, the jurors ate and drank;[1] and he prayed a *venire facias de novo.* Upon which Vavisor held that the verdict was bad because of this misdemeanor[2] of the jurors, and awarded a new *venire facias.*[3] *Quod Nota.*

PRIOR v. POWERS.

1 Keble, 811. [*1665.*]

In an action upon the case for misusing a horse, Orlaby prayed a new trial, because the jurors in Bedfordshire being divided six

* It will be noted that most of the errors treated under chapters III, IV and V are corrected by a new trial, e. g., error in refusing a continuance, in selecting a jury, in ruling on matters of evidence, in compelling joinder in a demurrer to the evidence, in directing a verdict, in charging the jury, etc.

It is not intended in this section to exhaust the possible grounds for new trials, but merely to take up the more common ones, not touched under the preceding headings.—ED.

[1] See Sanders v. Freeman, Moore, 33, *ante*, p. 590.

[2] Brookes New Cases, 447 (1556): "Jury took a scroll of the plaintiff, which was not delivered to them in court, and passed for the plaintiff: and because that this matter appeared to the court by examination, therefore the plaintiff shall not have judgment. 3 M. 1 B. Jurors 8."

[3] For the supposed distinction between a motion for a new trial and a venire *facias de novo*, see L. C. J. Willes in Witham v. Lewis, 1 Wilson 48, loc. 55-6.

and six they agreed by lot, putting two sixpences into a hat, that which the bailiff took, that way the verdict should go, which was for the plaintiff, and second, damages; but the court denied it, because it appeared only by pumping a juryman, who confessed all; but being against himself, it was not much regarded. Also the court cannot grant new trial without punishing the jury, which cannot be by this confession against themselves: And by Windham, this is as good a way of decision as by the strongest body, which is the usual way, and is suitable in such cases to the law of God. Twisden doubted it would be of ill example, and in Sir Philip Acton case, on such verdict, on fillip of counter, a new trial was granted, but here it was denied.

HALE v. COVE.

1 Strange, 642. [*1726.*]

The jury having sat up all night, agreed in the morning to put two papers into a hat, marked P. and D. and so draw lots; P. came out, and they found for the plaintiff, which happened to be according to the evidence and the opinion of the judge.

Upon motion for a new trial, it was agreed that the verdict must be set aside; but the question was, whether the defendant should pay costs; the court inclined to give the plaintiff costs, comparing it to the case of a verdict against evidence; but at last it was agreed that the costs should wait the event of the new trial.

DANA v. TUCKER.

4 Johnson (N. Y.), 487. [*1809.*]

This was an action for a breach of promise of marriage, tried at the last Madison circuit, when the jury found a verdict for the plaintiff for $439.58.

Gold now moved to set aside the verdict, for the misbehavior of the jury. He read the affidavit of the constable, who was sworn to attend the jury, while they retired to deliberate on their verdict, who stated, that the jurors agreed, that each of them should mark down such sum as he thought fit to find, and

the sum total being divided by twelve, the quotient should be the verdict, and that the verdict was so ascertained.

Similar affidavits of two of the jurors were also read.

N. Williams, *contra*, read the affidavits of two other jurors, stating that the jury, after some deliberation, unanimously agreed to find a verdict for the plaintiff; that each juror then privately marked the sum he was inclined to give; eight of them marked $500, one $600, and one $50. The sums so marked were added together, and the amount divided by twelve, and the sum produced by the division they afterwards agreed should be their verdict. After the verdict was delivered in court, in the usual form, the jury were polled, and each of the jurors, on being asked whether he agreed to the verdict, declared his assent.

Per curiam. The better opinion is, and such is the rule adopted by the court, that the affidavits of jurors are not to be received to impeach a verdict; but they may be admitted in exculpation of the jurors, and in support of their verdict. Rejecting the affidavits of the two jurors against the verdict there is the affidavit of two other jurors in favor of the verdict, which must outweigh that of the constable. If the jurors previously agree to a particular mode of arriving at a verdict, and to abide by the contingent result, at all events, without reserving to themselves the liberty of dissenting, such a proceeding would be improper; but if the means is adopted merely for the sake of arriving at a reasonable measure of damages, without binding the jurors by the result, it is no objection to the verdict. Such appears to have been the case here; and after the result of the division was known, they individually assented to the sum as their verdict. The motion must be denied.

Rule refused.[1]

SLADE'S CASE.

Style, 138. [*1648.*]

The court was moved for judgment formerly stayed upon a certificate made by Baron Atkins that the verdict passed against

[1] See also Ray v. Goings, 112 Ill. 656, where it was sought to elicit the information on a poll of the jury.

For a case where the fact of a quotient verdict sufficiently appeared, see Int. Ag. Co. v. Abercrombie, 63 South. Rep. 547.

his opinion. BACON, Justice, said judgments have been arrested in the Common Pleas upon such certificates. Hales of counsel with the defendant prayed that this judgment might be arrested, and that there might be a new trial, for that it hath been done heretofore in like cases. But ROLL, Justice, held it ought not to be stayed, though it have been done in the Common Pleas, for it was too arbitrary for them to do it, and you may have your attaint [1] against the jury, and there is no other remedy in law for you; but it were good to advise the party to suffer a new trial for better satisfaction. And let the defendant take four days from hence to speak in arrest of judgment if the *postea* be brought in, if not, then four days from the time it shall be brought in.

WOOD v. GUNSTON.

Style, 466. [*1655.*]

Wood brought an action upon the case against Gunston for speaking of scandalous words against; and amongst other words for calling him traitor, and obtains a verdict against him at the bar, wherein the jury gave £1500 damages. Upon the supposition that the damages were excessive, and that the jury did favor the plaintiff, the defendant moved for a new trial. But Sergeant Maynard opposed it, and said that after a verdict the partiality of the jury ought not to be questioned, nor is there any presidents for it in our books of the law, and it would be of dangerous consequence if it should be suffered, and the greatness of the damages given can be no cause for a new trial, but if it were, the damages are not here excessive if the words spoken be well considered, for they tend to take away the plaintiff's estate and his life. Windham on the other side pressed for a new trial, and said it was a packed business, else there could not have been so great damages, and the court hath power in extraordinary cases, such as this is, to grant a new trial. GLYN, Chief Justice: It is in the discretion of the court in some cases to grant a new trial, but this must be a judicial, and not an arbitrary discretion,

[1] See remarks of EYRE, C. J., in Gibson v. Hunter, *ante*, p. 295.

and it is frequent in our books for the court to take notice of miscarriages of juries, and to grant new trials upon them, and it is for the peoples benefit that it should be so, for a jury may sometimes by indirect dealings be moved to side with one party, and not to be indifferent betwixt them, but it cannot be so intended of the court; wherefore let there be a new trial the next term, and the defendant shall pay full costs, and judgment to be upon this verdict to stand for security to pay what shall be recovered upon the next verdict.[1]

WOODFORD v. EADES.

1 Strange, 425. [*1721.*]

On a contract for stock between the plaintiff and J. S. they each deposit £200 in the hands of the defendant, and J. S. not performing his agreement the plaintiff sues for the deposit, and had judgment on demurrer, and took out a writ of inquiry, and proved his case; but the jury, on a notion that the defendant could not pay out the money without consent of both parties, gave 1d. damages; which was now set aside, the court saying, that the rule of not setting aside verdicts for the smallness of the damages did not extend to this case, where the jury mistook in point of law; and the chief justice said he knew no reason why the court should not interpose in the other case.

[1] Ash v. Ash, Comberbach, 357 (1697).

"Assault, battery, and false imprisonment. The Lady Ash pretended that her daughter, the plaintiff, was troubled in mind, and brought an apothecary to give her physic, and they bound her, and would have compelled her to take physic. She was confined but about two or three hours, and the jury gave her £2,000 damages.

"SIR BARTH. SHOWER moved for a new trial, for the excessiveness of the damages.

"HOLT, C. J.: The jury were very shy of giving a reason of their verdict, thinking they have an absolute despotic power, but I did rectify that mistake, for the jury are to try causes with the assistance of the judges, and ought to give reasons when required, that, if they go upon any mistake, they may be set right, and a new trial was granted."

BARKER v. DIXIE.

2 Strange, 1051. [*1736.*]

In case for a malicious prosecution of an indictment for felony the jury found for the plaintiff and gave 5s. damages. And upon motion for a new trial on account of the smallness of damages the court held there could be no new trial on that account;[1] for this was not a false verdict, as finding for the defendant would be, and would subject them to an attaint; whereas they having found rightly for the plaintiff, no attaint would lie. And new trials came in the room only of attaints, as a more expeditious and easy remedy.

PHILLIPS v. LONDON & S. W. RY. CO.

L. R. 5 Q. B. D., 78. [*C. A. 1879.*]

This was an appeal by the defendants from a decision of the Queen's Bench Division directing a new trial. The application was made on the ground of insufficiency of damages and misdirection. The court granted a new trial on the former ground only.

The action was brought by Dr. Phillips, a physician in Grosvenor Square, against the London and South Western Railway Company to recover damages in consequence of an alleged negligent act of their servants in bringing about a collision on the 8th of December, 1877, between the train in which Dr. Phillips was being carried to London, and a light engine which was on the same line of rail. * * *

The jury gave the plaintiff £7,000. The plaintiff moved for a new trial, which was granted by the Queen's Bench Division, on the ground that the amount of damages given by the jury was so small as to show that they must have left out of consideration some of the circumstances which ought to have been taken into account. The defendants appealed.

JAMES, L. J. In this case we are of opinion that we cannot on any of the points differ from the judgment of the Queen's Bench Division.

The first point, which is a very important one, relates to dis-

[1] See also Prichard v. Hewitt, 91 Mo. 547.

senting from the verdict of a jury upon a matter which, generally speaking, is considered to be within their exclusive province, that is to say, the amount of damages. We agree that judges have no right to overrule the verdict of a jury as to the amount of damages, merely because they take a different view, and think that if they had been the jury they would have given more or would have given less, still the verdicts of juries as to the amount of damages are subject, and must, for the sake of justice, be subject, to the supervision of a court of first instance, and if necessary of a Court of Appeal in this way, that is to say, if in the judgment of the court the damages are unreasonably large or unreasonably small then the court is bound to send the matter for reconsideration by another jury. The Queen's Bench Division came to the conclusion in this case that the amount of the damages was unreasonably small, and for the reasons which were given by the Lord Chief Justice, pointing out certain topics which the jury could not have taken into consideration. I am of opinion, and I believe my colleagues are also of opinion, for the same reasons and upon the same grounds, that the damages are unreasonably small, to what extent of course we must not speculate, and have no business to say. We are, therefore, of opinion that the Queen's Bench Division was right in directing a new trial. * * *

Appeal dismissed.

NORTHERN PAC. RY. v. HERBERT.

116 U. S. 642. [*1885.*]

The plaintiff sued for the loss of his leg which was crushed between the bumpers.

There was a verdict in favor of the plaintiff for $25,000. A motion for a new trial was made on various grounds; among others, that the damages were excessive. The court ordered that a new trial be granted unless he remitted $15,000 of the verdict, and in case he did so that the motion be denied. He remitted the amount, and judgment was entered in his favor for the balance, and costs of suit, which the Supreme Court of the Territory affirmed. The defendant then sued out this writ of error. * * *

Mr. Justice FIELD: * * *

2. The exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the amount awarded by the verdict was a matter within the discretion of the court. It held that the amount found was excessive, but that no error had been committed on the trial. In requiring the remission of what was deemed excessive it did nothing more than require the relinquishment of so much of the damages as, in its opinion, the jury had improperly awarded. The corrected verdict could, therefore, be properly allowed to stand.[1] Hayden v. The Florence Sewing Machine Co., 54 N. Y. 221, 225; Doyle v. Dixon, 97 Mass. 208, 213; Blunt v. Little, 3 Mason, 102, 107. * * *

STAFFORD v. PAWTUCKET HAIR-CLOTH CO.

2 Clifford, 82. [*1862.*]

Action to recover damages for the infringement of a patent on an improvement in hair-cloth looms. Defendants pleaded the general issue, and gave notice that they should prove the complainant not to be the original and first inventor of the improvement.

PITMAN, district judge, presided at the trial, which was had at the November Term, 1860, and charged the jury. Verdict for complainant for the sum of $2,500. * * *

CLIFFORD, J. A new trial is asked, among other reasons, because the damages awarded by the jury in the cause are excessive, and indicate a total misapprehension of the case, and the evidence in this regard, as shown by the report of the evidence.

In substance and effect, the charge of the court directed the jury to confine their attention to one machine, and they were expressly told that the court could see no particular proof of actual damages. Looking at the whole case, it is quite clear that the damages are greatly excessive, and plainly the finding was without sufficient evidence to justify it, and contrary to the charge of the court. Such errors may in many cases and under

[1] Accord, Ry. v. Hall, 232 U. S. 94; Chitty v. Ry., 166 Mo. 435 (reviewing Missouri cases). See also Land Co. v. Mann, 130 U. S. 69, reviewing large number of the American cases.

most circumstances be obviated by remitting the amount of the excess, but where the circumstances clearly indicate that the jury were influenced by prejudice or by a reckless disregard of the instructions of the court, that remedy cannot be allowed. Where such motives or influences appear to have operated, the verdict must be rejected, because the effect is to cast suspicion upon the conduct of the jury and their entire finding.

After careful consideration of the evidence and the circumstances of the trial, we are constrained to come to the conclusion that the case falls within the latter rule. Parties have a right to an impartial trial, and where the finding of the jury is so excessive, and so wholly opposite to the charge of the court, it is not possible to say that the requirements of the law in that behalf have been fulfilled.[1]

In view of the whole case, we are of the opinion that the verdict must be set aside and a

New trial granted.

WATT v. WATT.

L. R. Appeal Cases [1905], 115.

The respondent brought an action against the appellant for libel which was tried before GAINSFORD BRUCE, J., and a special jury. The defendant did not justify; the jury found a verdict for the plaintiff for £5,000, and the learned judge entered judgment for her for that sum. On appeal by the defendant the Court of Appeal (COLLINS, M. R., MATHEW and COZENS-HARDY, L. JJ.), considering that the damages awarded were excessive and unreasonable, made an order for a new trial unless the plaintiff consented to the damages being reduced to £1,500. The plaintiff consented, and the judgment of GAINSFORD BRUCE, J., was amended accordingly. Hence this appeal. * * *

EARL OF HALSBURY, L. C. My Lords, in this case I think there ought to be a new trial. I say this quite independently of what I have to say hereafter upon the subject of the jurisdiction of the court to direct the amount of the damages without the consent of both parties to the litigation. I think the trial itself was

[1] But see Heimlich v. Tabor, 123 Wis. 565 (an extreme case).

most unsatisfactory, and the verdict ought not to be permitted to stand. * * *

I am, however, further of opinion that the court has no jurisdiction to fix the amount of damages without the consent of both the parties. This question was raised in Belt v. Lawes (12 Q. B. D. 356), and though it was not necessary for the decision in that case, a weighty opinion was given by my noble and learned friend Lord Lindley, which has made me hesitate before I come to a conclusion opposed to his.

There has been, doubtless, some confusion in discussing the question of damages arising from the mode in which our law has grown up. The court itself has the right, and has exercised it in various ways when the question has arisen upon demurrer or default. It may send it, as has been commonly the practice, to the sheriff to assess; but it has the right, which has always been asserted, to decide that question for itself—probably because that question is often a question of law, where the damages are fixed by law, and where it was mere matter of law it was established in very early times (10 Hen. 6) that the court itself could even increase the damages; and so the learned editor of Reeves' History of the Common Law says: "There was always this distinction between trial by jury and mere inquisition or inquiry by a jury to assess damages—that, in the latter case the inquisition was only to inform the mind of the court and it was at their discretion whether they would award judgment for the amount found by the jury, whereas upon a trial they had no jurisdiction to interfere as to the amount of damages in cases of tort;" but where the jury had found larger damages than were laid in the declaration the court held they were entitled to restrict them to the amount claimed (2 Hen. 6, c. 7). The courts, however, adopted the somewhat unconstitutional proceeding of refusing to give the plaintiff judgment unless he would consent to reduce his claim to what ought to be considered reasonable, and hence the practice and the impression that the court, with the consent of the plaintiff, could reduce the amount of damages.

My Lords, I am unable after a very anxious examination of the earlier authorities to assent to the legality of this proceeding unless by the assent of both parties. The very indirect method of the proceeding that they would not give the plaintiff judgment shows that they could not do it without the plaintiff's

assent; and one can well understand that the defendant was not very likely to refuse his assent to a proceeding intended for his benefit. The theory of all the cases seems to me to be that the right of the court to interfere with a jury's verdict was only to be by the assent of both parties.

Assume it to be the constitutional view that a person can only have damages assessed against him for a tort, what right has a court to intervene and say that damages which in its judgment are appropriate shall be the amount assessed against him? The only judgment by a jury is one which the court itself by the hypothesis says is unreasonable and excessive. Has not the defendant a right to say, "I refuse to have judgment assessed against me by a court? The law gives me a right to a jury, and how does the fact that a jury have already found a verdict against me, which you decide cannot be allowed to stand because it is unreasonable and excessive, displace my right to have the verdict of a jury upon the question?"

Hesitating, as I do, to differ from the opinion expressed by my noble and learned friend Lord Lindley, I have come to the conclusion that there is no power in the court to alter the verdict except by ordering a new trial; and for these reasons I move your Lordships that the judgment appealed from be reversed and a new trial had.

Order of the Court of Appeal reversed and a new trial ordered.

ANONYMOUS.

1 Keble, 864. [*1665.*]

Ex motione Recordatoris WILD, the court on certificate of a judge, that verdict was given contrary to evidence, would not allow the sheriff should bring in the book of freeholders to the secondary, for the ill example; but ordered the sheriff should return a good jury in the new trial. HYDE, Chief Justice, conceived jurors ought to be fined if they would go against the *Hare* (?) and direction, take bit in mouth and go headstrong against the court; and said, that by the grace of God he would have it tried, seeing the attaint is now fruitless.

MARTYN v. JACKSON.

3 Keble, 398. [*1675.*]

Ex motione SYTHERFIELD for a new trial on parol affirmation of HALE, Chief Justice, to RAINSFORD, Justice, that the trial was against evidence. TWISDEN and WILD refused to grant it, the jury being judges of the fact, though verdict be against evidence, it's not to be set aside without a new law;[1] *contra* by RAINSFORD, 2 Bulstr. 222, 24. Juries are wilful enough, and denying new trial here, will but send parties into the chancery, yet new trial was denied.

BERKS v. MASON.

Sayer, 264. [*1756.*]

Upon a rule to show cause, why a new trial should not be had; RYDER, Ch. J., before whom the cause was tried, reported; that there was evidence on both sides; but that the evidence, for the party in whose favor the verdict is found, was so very slight, that the jury ought not, in his opinion, to have regarded it; and that the evidence for the other party was very strong; and he concluded with saying, that he was dissatisfied with the verdict.

At a former day, when this rule came on, it was said on showing cause; that if there be evidence on both sides, a new trial ought not to be granted, and the case of Smith v. Huggins, Mich. 14 G. 2, in this court was relied upon; wherein a new trial was refused, although LEE, Ch. J., reported; that the evidence

[1] Ashley v. Ashley, 2 Strange, 1142 (1740).

"The judge who tried this cause (which was upon a promissory note for £5,000 which the defendant insisted was forged) certified that the weight of the evidence was with the plaintiff, and he thought the jury would find for the plaintiff; but they found for the defendant.

"*Et per curiam*, as there was evidence on the part of the defendant, the jury are the proper judges which scale preponderates. It cannot be said to be a verdict against evidence, and therefore we will grant no new trial."

for the plaintiff, in whose favor the verdict was found, was slight, and that he had summed up strongly for the defendant; the opinion of the court being, that as there was evidence on both sides, a new trial ought not to be granted.

The matter was at that day ordered to stand over, for the chief justice to look into his notes, in order to make a fuller report.

After the chief justice had made the above report, it was said in support of the rule; that if the judge declare himself to be dissatisfied with the verdict, it is the constant practice to grant a new trial; and nothing was said by the council who had shown cause at the former day.

The rule was made absolute.

BRIGHT v. EYNON.

1 Burrow, 390. [*1757.*]

The plaintiff's counsel moved for a new trial, upon payment of costs, and obtained a rule "to show cause why this verdict should not be set aside upon payment of costs."

Lord MANSFIELD said that he did not choose, in any cause tried before him, to conclude the matter by a short report, "that he was satisfied, or dissatisfied, with the verdict." He would state the case particularly to the court; and reserve declaring his opinion of the verdict (which he had not yet intimated, either at the trial or since) till he had heard the counsel on both sides.

This was an action upon the case, brought by the plaintiff as executor of Hannah Crisp widow, deceased, against the defendant, upon a promissory note in the following words (all of the defendant's own writing), which was proved and read: "I acknowledge to have borrowed of Mrs. Hannah Crisp, this 29th day of September, 1753, the sum of £60, for which I promise to pay £5 per cent per annum, and to be accountable for the whole six months after notice given for that purpose. John Eynon, September 29, 1753."

The defendant set up a discharge by a writing in the following words: "I promise unto John Eynon, that, in consideration of his paying unto me interest for £60 he has of mine, during

my life, after the rate of £5 per cent per annum, that then the said £60, at my decease, shall be his, and his note for the same shall be void and of none effect. Witness my hand, this 10th day of October, 1753, Hannah Crisp." The body was all his own hand; but he called two witnesses who said they believed the name subscribed to be the hand of the testatrix; but their knowledge of her hand was very slight, one of them having only seen her sign a receipt.

He alleged that she gave this discharge, in consideration of a marriage between him and Rebeccah Bright, his now wife (sister to the plaintiff).

He produced a will, in his own custody, bearing date the 11th of August, 1753, by which the testatrix had made the said Rebecca Bright her executrix and residuary legatee.

This marriage was not until May, 1754; the testatrix died in April, 1756.

It came out, upon his own evidence, that the testatrix was not worth £200, and that she paid 5s. a week, or at the rate of £13 a year, for her board. He could make no proof of the consideration alleged; the farthest that any of his witnesses went was to say "that the testatrix seemed to approve the match."

The plaintiff, in reply, insisted "that the signature was forged." Josias Bright swore that the defendant's wife did not know the defendant had borrowed any money from the testatrix till after she was married. After she was acquainted with it she pressed him to pay the money, out of a legacy of £150 from one Sarah Hart which he received, for the testatrix might call it in. The defendant bid her not to be uneasy "for I must have six months notice."

Several witnesses proved that Hannah Crisp, about Michaelmas, 1754, talked of calling in the money upon this note, and lending it to other persons.

That in 1755 and 1756 she ordered letters to be wrote to the defendant for the money. When she gave these orders she produced the defendant's note and said "the interest was not enough to maintain her."

It was proved that the defendant entered a *caveat* at Doctor's Commons in April, 1756; and when he found she had made a will in favor of the plaintiff, and consequently revoked that which was in favor of his wife, he was very warm and mentioned

a note from him to her; and declared he would not withdraw his *caveat* unless it was given up.

The plaintiff examined no witness to say the signature was not her hand. By way of rejoinder they called witnesses to the defendant's character, who gave him a good one.

The defendant instructed his counsel to say that he always understood the gift to be revocable by Hannah Crisp during her life, but if she did not revoke or call in her money during her life then the debt was to be discharged.

The principal question made at the trial was "whether this latter note was forged or not." And, as to that, the two witnesses who believed it to be her hand, were not opposed by any witnesses to the contrary; the reason given was that the plaintiff had no opportunity of getting it inspected.

His lordship said he left two questions to the jury: (1st.) "Whether the name of the testatrix was forged." (2d.) If they took it upon the evidence laid before them to be her hand, then "whether it was not obtained by fraud, and without her knowing the contents and effect of the writing she signed."

The jury found for the defendant.

Lord MANSFIELD intimated nothing, then, as to his own opinion of the case; and professedly avoided doing it now, till he should have heard the counsel.

They were accordingly heard. And they who showed cause against the rule went very much at large into the propriety and rise of granting new trials. They urged that a verdict ought to be conclusive where evidence of any sort was given on both sides. That the forgery here was the only question, if the plaintiff objected fraud and imposition he must go to a court of equity for relief.

Lord MANSFIELD. Trials by jury, in civil causes, could not subsist now without a power, somewhere, to grant new trials.

If an erroneous judgment be given in point of law there are many ways to review and set it right.

Where a court judges of fact upon depositions in writing their sentence or decree may, [in] many ways, be reviewed and set right.

But a general verdict can only be set right by a new trial, which is no more than having the cause more deliberately considered by another jury; when there is a reasonable doubt, or perhaps a certainty, that justice has not been done.

The writ of attaint is now a mere sound in every case; in many it does not pretend to be a remedy.

There are numberless causes of false verdicts, without corruption or bad intention of the jurors. They may have heard too much of the matter before the trial and imbibed prejudices without knowing it. The cause may be intricate; the examination may be so long as to distract and confound their attention.

Most general verdicts include legal consequences, as well as propositions of fact; in drawing these consequences the jury may mistake and infer directly contrary to law.

The parties may be surprised, by a case falsely made at the trial, which they had no reason to expect, and therefore could not come prepared to answer.

If unjust verdicts, obtained under these and a thousand like circumstances, were to be conclusive forever, the determination of civil property, in this method of trial, would be very precarious and unsatisfactory. It is absolutely necessary to justice that there should, upon many occasions, be opportunities of reconsidering the cause by a new trial. And it is done in a way very favorable to the parties for whom the wrong verdict is given; it is, upon payments of costs. Whereas in other cases where a wrong judgment is reversed, costs are paid as if the right judgment had been given in the first instance.

It is not true "that no new trials were granted before 1655," as has been said from Style 466. * * *

The reason why this matter cannot be traced further back is "that the old report books do not give any accounts of determinations made by the court upon motions."

Indeed, for a good while after this time the granting of new trials was holden to a degree of strictness, so intolerable, that it drove the parties into a court of equity, to have, in effect, a new trial at law of a mere legal question; because the verdict, in justice, under all the circumstances, ought not to conclude; and many bills have been retained upon this ground, and the question tried over again at law under the direction of a court of equity. And, therefore, of late years, the courts of law have gone more liberally into the granting of new trials, according to the circumstances of the respective cases. And the rule laid down by Lord PARKER, in the case of the Queen against the Corporation of Helston, H. 12 Ann. B. R., seems to be the best general rule that can be laid down upon this subject, viz., "doing justice to

the party," or, in other words, "attaining the justice of the case."

The reasons for granting a new trial must be collected from the whole evidence, and from the nature of the case considered under all its circumstances.

This power may be exercised at much less expense of time and money, therefore more beneficially for the subject, by the court of common law where the cause has been tried.

Of late years, new trials have been granted not only after trials at *nisi prius*, but also after trials at bar. And it is at least equally reasonable to do it after trials at bar as after trials at *nisi prius* (if the justice of the case demands it); or, indeed, rather more so, as the latter must be done upon what could have actually and personally appeared to a single judge only, whereas the former is grounded upon what must have manifestly and fully appeared to the whole court.

I come now to the present verdict, and should be sorry that the question depended upon my being satisfied, or dissatisfied; and therefore I have stated the whole.

If the matter in dispute was of great value, I will not say that all the suspicious circumstances might not be a ground for a new trial; to give the plaintiff an opportunity of getting the instrument inspected by persons acquainted with her hand; though I think upon the evidence laid before the jury the verdict in that respect was right.

What I go upon is the apparent manifest fraud and imposition in obtaining the discharge from the testatrix, if she really signed it.

Fraud or covin may, in judgment of the law, avoid every kind of act; many instances are put in Fermor's case, 3 Co. 77.

What circumstances and facts amount to such fraud "or covin" is always a question of law. Courts of equity, and courts of law have a concurrent jurisdiction to suppress and relieve against fraud. But the interposition of the former is often necessary for the better investigating truth, and to give more complete redress.

The writing, upon the face of it, speaks imposition. It purports being for consideration. She releases the principal in consideration of £5 per cent during her life, which is only legal interest, and the precise rate he was obliged to pay by his note. The defendant has set up another consideration, not expressed,

which is not only not proved by him, but disproved by the evidence on both sides.

He now contends, and his counsel have argued, "that it was intended to be revocable by her during her life; and therefore was only in the nature of a legacy." That power "to revoke" is omitted; the writing, all of his own hand, and kept in his own custody; and if it was in the nature of a legacy it is revoked by the subsequent will.

The testatrix never imagined she had stripped herself of this money; in her circumstances it would have been madness. The defendant, during her life, did not dare to say, even to his own wife, "that the testatrix had given him this money."

He did not dare to claim it, immediately, after her death; but would have compounded, by withdrawing his *caveat*, to have got his note delivered up. No answer was attempted, by proof, to the apparent imposition. Upon his own case stated by himself, and the evidence on both sides, the transaction to get her hand to this writing must have been fraudulent; and if it be so the law says "he shall not avail himself of it."

The attention of the jury was artfully drawn to the heinous charge of forgery only. And I left the question of fraud to them, without any express direction "that the circumstances spoke fraud apparent." The same jury might, upon reconsideration, find a different verdict. I dare say they meant to do right.

But the merits of the case appearing to me in this light, I am clearly of opinion that there ought to be a new trial.

These are my sentiments; my brothers will judge whether I am right or not.

Mr. Justice DENISON concurred in them.

He added that it would be difficult perhaps to fix an absolutely general rule about granting new trials, without making so many exceptions to it as might rather tend to darken the matter than to explain it; but the granting a new trial, or refusing it, must depend upon the legal discretion of the court, guided by the nature and circumstances of the particular case, and directed with a view to the attainment of justice.

In the present case he said it appeared to him "that the testatrix, Mrs. Crisp, had been imposed upon." And he held "that fraud was sufficient to invalidate this her defeasance (the subsequent note of discharge signed by her) even in a court of com-

mon law." For proof of which he cited Throughgood's case, 2 Co. 9, where it was holden, "that the deed of an unlettered layman, into the execution whereof he is deceived, by its being wrong read to him, or falsely explained to him (though by a stranger to the party to whom the deed is made), shall not bind the unlettered person who made it."

Mr. Justice FOSTER agreed to the propriety of what had been said, as to such cases in which the juries give verdicts against evidence, and even as to cases where there may be a contrariety of evidence, but the evidence, upon the whole, in point of probability, greatly preponderates against the verdict (which, depending on a variety of circumstances, is matter of legal discretion, and cannot be brought under any general rule); but in all cases where the evidence is nearly *in aequilibrio*, he declared that he should always think himself bound to have regard to the finding of the jury; for "*ad quaestionem facti respondent juratores.*" In such a case it is not the province of the judge to determine; it ought to be left to the jury. * * *

METROPOLITAN RY. v. WRIGHT.

L. R. 11 Appeal Cases, 152. [*1886.*]

Appeal from a decision of the Court of Appeal.

The respondent, a passenger on the appellants' line, stepped out of a train at King's Cross Station and was by the motion of the train thrown on to the platform, sustaining injuries in respect of which she brought this action. At the trial before HUDDLESTON, B., and a special jury in July, 1884, the plaintiff's case was that the company's servants were guilty of negligence in not looking out and not answering her calls for assistance and in allowing the train to move on after she had begun to alight. The defendants' case was that there was no negligence on their part; that the train had begun to move before the plaintiff had begun to alight, and that the accident was caused or contributed to by her negligence. Upon these points there was conflicting evidence; the plaintiff being called on the one side, and several of the company's servants on the other.

The jury found a verdict for the plaintiff for £300. The

Divisional Court (Lord COLERIDGE, C. J., and STEPHEN, J.) ordered a new trial on the ground that the verdict was against the weight of the evidence. The Court of Appeal (Earl of SELBORNE, L. C.; BRETT, M. R., and LINDLEY, L. J.) on the 7th of March, 1885, reversed this decision and ordered the verdict to stand. In the course of giving judgment the following observation were made:

Earl of SELBORNE, L. C. We all think that there are not sufficient grounds for a new trial in this case. As the verdict was not perverse or unreasonable, looking to the evidence given, it does not seem to us to be a case in which the decision of the jury, who are the proper judges of such questions, should be interfered with. The damages are, I think, plainly not excessive, if the verdict is right, or if the verdict was one which the jury, in the exercise of their proper judgment, were entitled to give. In many cases the principles on which new trials should be granted on the ground of difference of opinion which may exist as to the effect of the evidence have been considered, both in the House of Lords and in the lower courts, and I have always understood that it is not enough that the judge, who tried the case, might have come to a different conclusion on the evidence than the jury, or that the judges, in the court where the new trial is moved for, might have come to a different conclusion, but there must be such a preponderance of evidence, assuming there is evidence on both sides to go to the jury, as to make it unreasonable, and almost perverse, that the jury when instructed and assisted properly by the judge should return such a verdict. If I am at all right in that view, then I may say I cannot come to the conclusion that this is a verdict which upon the evidence before them the jury were not well entitled to find.

Lord FITZGERALD. My lords, I concur in the conclusion announced by the noble and learned lord on the woolsack, and I should not add a word but that it is very desirable that we should understand the grounds upon which the courts exercise a control over the verdict of a jury once found. In this case there was evidence given at the trial on both sides, and on all the issues, proper to be submitted to and considered by the jury. Such appears to have been the opinion of the Divisional Court, and it was clearly that of the Court of Appeal. The judge who presided at the trial could not properly have withdrawn the case from the jury. The jury gave their verdict for the plaintiff.

The judgment of the noble and learned earl who presided in the Court of Appeal imports that a verdict once found is not to be set aside unless it appears to be a verdict perverse or almost perverse. If my recollection does not mislead me, we have departed in this House, in several instances, from the old rule which introduced the element of "perversity," and have substituted for it that the verdict should not be disturbed unless it appeared to be not only unsatisfactory, but unreasonable and unjust. The question, then, for your lordships' consideration is whether the evidence so preponderates against the verdict as to show that it was unreasonable and unjust. I am of opinion that the appellants, upon whom the *onus* lies, have failed to establish that this verdict was unreasonable or unjust, and therefore I think that it ought not to be disturbed. There is no principle at stake, and there is nothing involved in the case save the amount of the verdict.

Lord HALSBURY. My lords, the facts of this case may, of course, be differently viewed by different minds. I am content with the view of the facts as stated by the lord chancellor, and I am disposed to think that I should have found the same verdict. But what I take to be of supreme importance, as defining the functions of judges and juries, is the principle upon which a new trial can be granted upon the ground that the verdict is against the weight of the evidence.

Now I think that the principle laid down in Solomon v. Bitton (8 Q. B. D. 176) is erroneous, as reported, in the use of the word "ought." If a court—not a Court of Appeal in which the facts are open for original judgment, but a court which is not a court to review facts at all—can grant a new trial whenever it thinks that reasonable men ought to have found another verdict, it seems to me that they must form and act upon their own view of what the evidence in their judgment proves. That, I think, is not the law. If reasonable men might find (not "ought to" as was said in Solomon v. Bitton)[1] the verdict which has been found, I think no court has jurisdiction to disturb a

[1] Solomon v. Bitton, L. R. 8 Q. B. D. 177.

"The court (JESSEL, M. R., and BRETT and COTTON, L. JJ.) reversed the order appealed from, saying that the rule on which a new trial should be granted on the ground that the verdict was unsatisfactory as being against the weight of evidence, ought not to depend on the question whether the learned judge who tried the ac-

decision of fact which the law has confided to juries, not to judges.

My noble and learned friend on the woolsack has put the proposition in a form which is not open to objection, but which perhaps leaves open for definition in what sense the word "properly" is to be used. I think the test of reasonableness, in considering the verdict of a jury, is right enough, in order to understand whether the jury have really done their duty. If their finding is absolutely unreasonable, a court may consider that that shows that they have not really performed the judicial duty cast upon them; but the principle must be that the judgment upon the facts is to be the judgment of the jury and not the judgment of any other tribunal. If the word "might" were substituted for "ought to" in Solomon v. Bitton I think the principle would be accurately stated.

I concur in the motion of my noble and learned friend on the woolsack that this appeal should be dismissed with costs.

Order appealed from affirmed; and appeal dismissed with costs.

JONES v. SPENCER.

77 L. T. R. 536. [*H. of L. 1898.*]

This was an appeal from an order of the Court of Appeal (Lord ESHER, M. R., and CHITTY, L. J., LOPES, L. J., dissenting) refusing a new trial in an action tried before LAWRANCE, J., and a jury.

The action was brought by the respondent, a horse dealer in London, against the appellant, a farmer at Bromsgrove, in Worcestershire, to recover the sum of £70 for breach of a warranty of a cart horse which the respondent had purchased from the appellant on a warranty that the horse was at the time of the purchase "a good worker."

The case of the respondent was that on the arrival of the horse by train in London it was immediately found to be "a shiverer," and as such unable to back, and consequently not a good worker.

tion was or not dissatisfied with the verdict, or whether he would have come to the same conclusion as the jury, but whether the verdict was such as reasonable men ought to have come to."

In support of his case the respondent called several veterinary surgeons who had examined the animal shortly after its arrival in London and pronounced it to be a very bad shiverer and suffering from a disease which must have been in existence at the time of its purchase by the respondent.

On the other hand the appellant called a number of witnesses who had used the animal continually, and swore that up to the time of the sale the animal was perfectly sound and had shown no symptom of shivering.

The jury found for the respondent for the amount claimed.

The appellant thereupon applied to the Court of Appeal for a new trial, on the ground that the verdict was against the weight of evidence.

In the course of his judgment Lord ESHER, M. R., remarked that, short of perverseness on the part of the jury, it was nearly, if not quite, impossible that a new trial could be obtained, on the ground that a verdict was against the weight of evidence when there was conflicting evidence in the case.

LOPES, L. J., thought that the Court of Appeal had gone rather too far in refusing new trials in such cases, and that it was clear from the judgment delivered in the House of Lords in the case of the Metropolitan Railway Company v. Wright (54 L. T. Rep. 658; 11 App. Cas. 152) that a new trial ought to be granted if it were necessary to prevent a miscarriage of justice. * * *

Lord MORRIS. My lords, I concur in the result at which your lordships have arrived, and I should have been entirely satisfied with merely saying so, but that it appears to me to be really necessary to say a word or two upon the decision of the Court of Appeal in this case. That court seems to have been under the impression that there had been a new rule of law established by the decision of this House in Metropolitan Railway Company v. Wright *(ubi. sup.)* as applicable to the granting of new trials. That mistake may possibly have arisen, in my opinion, from the use by Lord SELBORNE, L. C., in giving judgment in the Court of Appeal in that case, of the expression that "the verdict was not perverse or unreasonable;" he brackets the two terms together as if they were somewhat synonymous. As I observed in the course of the argument, a verdict known as "perverse" is one in which the jury have disobeyed the directions of the judge. In that case it would be called a "perverse verdict," and it would be set aside upon grounds wholly different and dissimilar from

those which would lead a court of review to set aside a verdict as being against evidence, or against the weight of evidence. Lord ESHER, M. R., in giving his judgment in the present case, laid down this rather strong doctrine: "If you can show that the jury have acted perversely, and have not attended to, or taken any notice of the evidence, that they have wilfully disregarded what they were about, and would not consider the evidence, then, although there was some evidence, I should say that the verdict was perverse, and I should overrule it. But, short of that, short of showing some disregard or misconduct of the jury, I think that it is nearly impossible, if not quite impossible, for this court now to set aside a verdict." That appears to me to stretch too far the doctrine applicable to setting aside verdicts as against evidence, or as against the weight of evidence. The use of the word "weight" implies that there is evidence on both sides, but that it preponderates to such an extreme degree on the one side that it would be unreasonable for the jury not to act upon it, although there may be some slight weight in the other scale. That doctrine of setting aside a verdict as being against evidence, or against the weight of evidence, has lasted in the courts for an immense time. It would be entirely frittered away, in my opinion, if the analogy with a "perverse" verdict, to which I have already called attention, or "wilful misconduct" on the part of the jury, were to be taken as the criterion to apply to it. The criterion to apply to it was stated by the noble and learned lords who gave judgment in this House, in Metropolitan Railway Company v. Wright, and in my opinion it was also stated by Lord ASHBOURNE in giving judgment in the Privy Council, in Municipal Council of Brisbane v. Martin (1894), A. C. 249, and that is where the tribunal which has to decide the question comes to the conclusion that the jury have, in the verdict at which they have arrived, acted unreasonably upon a contrast of the whole of the evidence on both sides. That has been the definition, and it appears to me that it would be entirely abolished and got rid of it we were to accede to the doctrine that it was necessary to prove that the verdict was either "perverse" or had arisen from any "wilful misconduct" on the part of the jury, or "from their having shown some disregard of what they were about." The most honest jury, possibly from dullness, or from a variety of other reasons, may have arrived at a verdict which the tribunal which has to review it might hold to be unreasonable, and that

appears to me to come within the rule. I think it would be a very lamentable thing if the doctrine were stretched to the extent laid down by Lord ESHER, M. R., in the present case in giving judgment in the Court of Appeal.

New trial ordered.

MOUNT ADAMS RY. CO. v. LOWERY.

74 Federal Rep. 463. [*C. C. A. 1896.*]

Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This is an action for injuries to a passenger on a cable street car in the city of Cincinnati. The defendant in error, Joseph A. Lowery, was injured by riding on the front seat of an open grip car, by reason of a collision between a car going north on Gilbert avenue and a large ice wagon going south. The wagon belonged to the Cincinnati Ice Company, and his action for damages was brought against both the car company and the ice company, alleging negligence upon the part of both. During the course of the trial, it appeared that the driver of the ice wagon was out upon a private expedition of his own, whereupon the court, being of opinion that the ice company was not responsible for the negligence of the driver, under such circumstances, directed a verdict in its favor. The case then proceeded against the railway company as sole defendant, and resulted in a verdict for the plaintiff for $7,500.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court. * * *

The fifth error assigned can best be considered at this point. It is that the court erred in refusing to direct a verdict for the defendant at the close of all the evidence. In support of this motion the entire facts of the case have been elaborately argued. Under the repeated rulings of this court, as well as of the Supreme Court, it must be regarded as well settled that upon a writ of error no question can be raised as to whether the verdict was against the weight of the evidence. That was a question for the sole determination of the trial judge upon the motion for a new trial. His action in refusing a new trial upon that ground cannot be assigned as error. The motion for a peremptory di-

rection at the close of all the evidence was based upon the supposed insufficiency of the evidence, in point of law, to establish any negligence against the street-railway company. What possible care and skill did that company fail to use, which, if they had used, the collision might have been avoided? In the solution of this question we are not to weigh the evidence, nor to determine the value of conflicting evidence. The question, when a motion to direct a verdict is made, is this: Is there any material and substantial evidence, which, if credited by the jury, would in law justify a verdict in favor of the other party? If there was, it cannot be held error that the trial judge declined to direct the verdict, and submitted the value of that evidence to the consideration of the jury. The duty of a trial judge under such circumstances was much considered in Railway Co. v. Slattery, 3 App. Cas. 1155, where, though the court was divided in opinion as to the result, there was great unanimity of judgment as to the proper rule where there is any substantial conflict of evidence. In that case it was held, after great deliberation (no less than eight of the law lords delivering separate opinions), that "where there is conflicting evidence on a question of fact, whatever may be the opinion of the judge who tries the cause as to the value of that evidence, he must leave the consideration of it for the decision of the jury." * * *

[The opinion here reviews Ry. v. Slattery, 3 App. Cas. 1155; Greenleaf v. Birch, 9 Pet. 292; U. S. v. Laub, 12 Pet. 1; Insurance Co. v. Doster, 106 U. S. 30; Ry. v. Cox, 145 U. S. 593; Toomey v. Ry., 3 C. B. (N. S.) 150; Jewell v. Parr, 13 C. B. 916; Ryder v. Wombwell, L. R. 4 Exch. 36; Giblin v. McMullen, L. R. 2 P. C. 335; Ry. v. Jackson, 3 App. Cases, 193; Bridges v. Ry., 7 H. L. 213; Denny v. Williams, 5 Allen, 5; Parker v. Ross, 11 How. 362; Schuchardt v. Allen, 1 Wall. 359; Imp. Co. v. Munson, 14 Wall. 442; Pleasant v. Fant, 22 Wall. 116; Bk. v. Smith, 11 Wheat. 171.]

Neither is it a proper standard to settle for a peremptory instruction that the court, after weighing the evidence in the case, would, upon a motion for a new trial, set aside the verdict. The court may, and often should, set aside a verdict, when clearly against the weight of evidence, where it would not be justified in directing a verdict. Neither do we understand this view to be in conflict with anything decided by the Supreme Court. When that court said in Insurance Co. v. Doster, cited heretofore, that

a case should not be withdrawn from the jury "unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it," it did not mean to define the limits within which a trial judge might and ought to grant a new trial because against evidence, or against the weight of evidence. Many cases occur, in the history of *nisi prius* trials, where a new trial ought to be granted because the verdict is clearly against the weight of evidence, when it would have been erroneous to have directed a verdict in the first instance. Still there is no absolute rule justifying a new trial merely because the trial judge would, upon weighing the evidence, have found contrary to the view of the jury. He must exercise a sound judicial discretion,—a discretion not reviewable in appellate courts of the United States upon writ of error. In illustration of the limits within which this discretion may properly be exercised, we cite some instances:

In Burton v. Thompson, 2 Burrows, 664, Lord Mansfield said:

"It does not follow, by necessary consequence, that there must be a new trial granted, in all cases whatsoever, where the verdict is contrary to evidence; for it is possible that the verdict still be on the side of the real justice and equity of the case. And of this there are several instances in the printed books, particularly the Duchess of Mazarine's Case, in 2 Salk. 646."

He added:

"Therefore I do not think that we ought to interfere merely to give the plaintiff an opportunity of harassing the defendant, at a great expense to himself, where there has been no real damage, and where the injury is so trivial as not to deserve above a half crown compensation."

A new trial will not be granted, though against the evidence, if found for the defendant, if the action was frivolous, trifling, and vexatious. Macrow v. Hull, 1 Burrows, 11.

In Farewell v. Chaffey, 1 Burrows, 54, Lord Mansfield said: "A new trial ought to be granted to obtain real justice, but not to gratify litigious passions," and cited Smith v. Brampston and Smith v. Frampton, 2 Salk. 644, and other old cases. In this case he said:

"The verdicts were against evidence and the strict rule of law, * * * but the court would not give a second chance of success to a hard action or unconscionable defense."

In Norris v. Freeman, 3 Wils. 39, the court said:

"There are many cases where the court will grant new trials notwithstanding there was evidence on both sides, as where all the light has not been let in at the trial which might and should have been."

In an anonymous case referred to in 1 Wils. 22, the report is as follows:

"On a motion for a new trial in an action by the owner of the inheritance for making a dam across an ancient water course, the judge who tried the cause certified that six witnesses were examined at the trial, on each side; that the jury found for the defendant, which was against his opinion; but that he could not take upon himself to say that this was a verdict against evidence, because there was evidence on both sides. So a new trial was refused." * * *

[The opinion here reviews, Swinnerton v. Stafford, 3 Taunt. 238; Solomon v. Bitton, 8 Q. B. Div. 177; Webster v. Friedeberg, 17 Q. B. D. 736; Ry. v. Wright, 11 App. Cas. 152; Phillips v. Martin, 15 App. Cas. 194; Brisbane v. Martin, 19 App. Cas. 252; Newspaper Co. v. Bennett, 19 App. Cas. 287; Lunt v. Ry. L. R. 1 Q. B. 281.]

The rule in the American courts seems to be that, if the verdict be clearly and manifestly against the evidence or the weight of evidence, a new trial should be granted. Wait v. McNeil, 7 Mass. 261; Curtis v. Jackson, 13 Mass. 507. In Hammond v. Wadhams, 5 Mass. 353-355, the rule is thus stated by PARSONS, C. J.:

"We may, and we ought to, grant a new trial when the verdict is against the evidence, or when it is manifestly against the weight of the evidence. In such cases the facts ought to be inquired into by another jury."

Where the evidence submitted to the jury is such as to render the issue doubtful, a new trial will not be granted, even though the verdict is against the apparent weight of the evidence. Brown v. Wilde, 12 Johns. 455; Stryker v. Bergen, 15 Wend. 491.

It is said in Tidd's Practice, in his chapter on New Trials, that:

"A new trial may be moved for on account of the error or mistake of the jury in finding a verdict without, or contrary to, evidence. But, where there is evidence on both sides, it is not usual to grant a new trial, unless the evidence for the prevailing

party be very slight, and the judge declared himself dissatisfied with the verdict." 2 Tidd's Prac., pp. 907, 908.

If evidence be of so slight a character as to come within a reasonable definition of the scintilla rule, it is the duty of the court to direct a verdict, or, if it has submitted the matter to the jury, to set aside a verdict having no other support than a mere scintilla. In all such cases the evidence is insufficient in law.

The language of Justice MILLER in Pleasants v. Fant, cited heretofore, has been used to justify the claim that there is no difference between the insufficiency of evidence to sustain the *onus* of proof which would justify a peremptory instruction to a jury, and that which will require the court to set aside a verdict as against the weight of the evidence; and yet we find in the language of Mr. Justice SWAYNE, in Schuchardt v. Allens, already cited, a statement that the rules which govern a court in granting a new trial because the verdict is against the weight of the evidence are quite different from those which determine the question for the court whether it shall deliver a peremptory instruction to the jury. An examination of the cases upon which the result was put, and of the issue there presented to the court, justifies the inference that what Mr. Justice MILLER was arguing against was the absurdity of the scintilla rule, by which a case was submitted to the jury on mere surmises, and slight tendencies of evidence to establish a fact, when the court was fully advised that a verdict could not stand upon such evidence. The language which he used is to be taken as applying to the scintilla of evidence rule, and to the authoritative declaration by the court that such a rule was not to prevail in common-law trials in the Federal Courts. To give it any other construction must lead to a result at war with the language of Mr. Justice SWAYNE in Schuchardt v. Allens, already referred to, that the rules which prevail in the English courts, the decisions of which were relied upon by Mr. Justice MILLER to sustain the view which the court took in Pleasants v. Fant, are in conflict with the considered opinion by the Supreme Court in which the very point now under consideration was presented to that court in the subsequent case of Railway Co. v. Moore, 121 U. S. 558, 7 Sup. Ct. 1334. In that case the question presented to the court was whether, under a statute governing the procedure in

the Supreme Court of the District of Columbia, a motion for a new trial on the ground of insufficient evidence entitled the defendant against whom the verdict was rendered to bring from the special to the general term the ruling for examination upon a motion for a new trial on the ground that the verdict was against the weight of the evidence. The court held that the term "insufficient evidence" included both evidence insufficient in law and evidence insufficient in fact, and, therefore, that the Supreme Court of the district in general term had erred in not considering the motion for a new trial on the ground that the verdict was against the weight of the evidence. Mr. Justice MATHEWS considers the question as to what is meant by a motion for a new trial on the ground that the verdict is against the weight of the evidence. * * *

It seems to us to follow, from both reason and authority, that there is a difference between the legal discretion of the court to set aside a verdict as against the weight of evidence, and that obligation which the court has to withdraw a case from the jury, or direct a verdict, for insufficiency of evidence. In the latter case it must be so insufficient in fact as to be insufficient in law; in the former case it is merely insufficient in fact, and it may be either insufficient in law, or may have more weight, and not enough to justify the court, in exercising the control which the law gives it to prevent injust verdicts, to allow a verdict to stand. Randall v. Railroad Co., heretofore cited, and the long line of cases in which it has been affirmed, profess to stand upon the English cases which we have cited, and particularly upon Ryder v. Wombwell, L. R. 4 Exch. 32-39. In that and other cases cited, and notably in the leading case of Railway Co. v. Slattery, 3 App. Cas. 1155, it appears that cases were constantly presented in which the court say a verdict should have been set aside as against the weight of evidence where the court would not be justifiable in directing a verdict. We do not think, therefore, that it is a proper test of whether the court should direct a verdict, that the court, on weighing the evidence, would, upon motion, grant a new trial. A judge might, under some circumstances, grant one new trial and refuse a second, or grant a second and refuse a third. In passing upon such motions he is necessarily required to weigh the evidence, that he may determine whether the verdict was one which might rea-

sonably have been reached.[1] But, in passing upon a motion to direct a verdict, his functions are altogether different. In the latter case we think he cannot properly undertake to weigh the evidence. His duty is to take that view of the evidence most favorable to the party against whom it is moved to direct a verdict, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for the party having the *onus*. If not, he should, upon the ground that the evidence is insufficient in law, direct a verdict against that party. That there is a mere scintilla of evidence is not enough to prevent the withdrawal of the case from the jury. Such evidence is insufficient in law, because so insufficient in fact. It is impossible, in the very nature of the subject, to lay down a hard and fast rule by which a trial judge may determine when the evidence is of greater weight than to be regarded as a mere scintilla. We only wish to be understood as holding that whenever there is evidence of so positive and significant a character as, if uncontradicted, would support a verdict, it is the duty of the court to submit the case to the jury, under proper instructions. It is certainly not his function to weigh the evidence for the purpose of saying how the verdict should go.

We have deemed it important, before considering the facts of this case, to clearly state the rule which must be applied as a

[1] BREWER, J., in Kansas, etc., Ry. v. Kunkel, 17 Kan. 145: "But counsel contend that trial judges in this state imagine the same rule governs their action as ours. We do not positively know how this may be. Two of our number have had experience as trial judges, and never so understood the law; and we have yet to meet a district judge who has so expressed his understanding thereof. The functions of the two are widely dissimilar. The one has the same opportunity as the jury for forming a just estimate of the credence to be placed in the various witnesses, and if it appears to him that the jury have found against the weight of the evidence, it is his imperative duty to set the verdict aside. We do not mean that he is to substitute his own judgment in all cases for the judgment of the jury, for it is their province to settle questions of fact; and when the evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions thereon, he has no right to disturb the findings of the jury, although his own judgment might incline him the other way. In other words, the finding of the jury is to be upheld by him as against any mere doubts of his correctness. But when his judgment tells him that it is wrong, that whether from mistake, or prejudice, or other cause, the jury have erred, and found against the fair preponderance of

test of alleged error where an assignment of this character is under consideration. * * *

GOODWIN v. GIBBONS.

4 Burrow, 2108. [*1767.*]

After two verdicts for the plaintiff, the defendant had moved for another new trial. It was an action of trespass; and the trials had been in Chester.

The defendant was an attorney. At the first trial the jury found that he had acted beyond his office and authority or his duty as an attorney; and gave a verdict for the plaintiff; which verdict was set aside, and a new trial granted. The second verdict was also found for the plaintiff, which second verdict was now prayed to be set aside also; and a third trial was prayed. A rule was made upon the plaintiff, to show cause.

Upon showing cause, Mr. Morton's report was read; and the question was much litigated; but it is not necessary to specify the particulars; because only the general doctrine laid down is meant to be here taken notice of.

Lord MANSFIELD. There is no ground to say that a new trial

the evidence, then no duty is more imperative than that of setting aside the verdict, and remanding the question to another jury. It was a fear, in view of the meagerness of the testimony, that this duty had not been fully recognized, that drew from this court the expressions it used in the two cases which counsel especially criticize. Whenever, on the other hand, a case reaches this court upon the record, and it appear that the trial court has, by overruling a motion for a new trial, approved of the verdict, it is and must be taken as its certificate that the verdict is either fully in accord with its belief upon the testimony, or else that there was such a fair and reasonable doubt as to the weight of the evidence, pro and con, that honest and intelligent minds might fairly differ in their conclusions, and that therefore the verdict of the jury should be accepted as just. We have, therefore, not the witnesses, but the finding of the jury *prima facie* right, and also the approval of the only judge who has anything like full opportunities of knowing whether it was right. Under those circumstances it should be a very clear case before a reviewing court should interfere. The due administration of the law demands, and in the long run the most satisfactory and the most complete justice will be secured by leaving the settlement of questions of fact to the tribunals which see and hear the witnesses."

shall not be granted after a former new trial has been once granted before.

There is an index to a report-book, which mistakes a decisive particular reason in a particular case, for a general rule. See Modern Cases, index, under the word "trial"—"After a trial at bar, a new trial denied."

But there is no such general rule as has been supposed. A new trial must depend upon answering the ends of justice.

However, in the present case, he said he did not see any reason for a new trial. He observed that here is no question of right, nor any great value; and upon the whole, he was clear that no new trial ought to be granted.

Mr. Justice YATES was clear, that a second new trial might be granted, as well as a first,[1] if the reasons for granting it were sufficient.

But he also thought that in the present case, there was no sufficient reason for granting one.

LOVEDAY'S CASE.

Style, 129. [*1648.*]

The court was moved upon an affidavit that one of the jurors that gave the verdict against the plaintiff had a suit in law depending at that time with the plaintiff, and therefore that the trial was not indifferent, and therefore it was prayed there might be a new trial. But the court said, it could not be, and asked

[1] Davies v. Roper, 2 Jur. (N. S.) 167 (1856).

"ALDERSON, B.—There must be a third trial—that is all. The case is not like the one we had this morning, where the judge merely reported that he should not have found as the jury did. Here we have the opinion of the judge, who saw the witnesses, and knows all the circumstances of the case better than we can, that the verdict is a very wrong verdict.

"PLATT, B.—The judge by whom the cause is tried hears the addresses of counsel to the jury, who often form their opinion on topics addressed to their prejudice, such as one of the parties being a poor man and his antagonist a rich one. That is just this case."

See, also, Foster v. Steele, 3 Bingham N. C. 892; Graham v. Traction Co., 65 N. J. L. 539; Wright v. South. Exp. Co., 80 Fed. 85.

the party why he did not challenge the juror for this cause at the trial, for want of which he had now lost that advantage.[1]

LADY HERBERT v. SHAW.

11 Modern, 118. [*1708.*]

Upon an issue joined, in an action between Lady Catharine Herbert, daughter of the Duke of Leeds, and the Fishermen of Milton, a letter was written by the Duke of Leeds to every particular juryman, wherein he desires their appearance at the trial, and concludes his letter in these words, "Which I shall take as a great obligation, particularly from yourself, and shall be glad of an occasion to show how much I am, sir, your humble servant."

Upon which the defendant moved for a new trial.

POWELL, Justice, said, he remembered a case in the court of common pleas, where a stranger wrote to a juryman to con-

[1] GRAY, C. J., in Wassum v. Feeney, 121 Mass. 93: "The juror in question, being under twenty-one years of age, was not qualified as the statutes require. Gen. Sts. Chap. 132, § 1; Chap. 6, § 1. But his name being upon the list of the jurors returned and empaneled, the defendant had the opportunity, by proper inquiry, of ascertaining any grounds of objection to him, and might have challenged him before the trial began.

"When a party has had an opportunity of challenge, no disqualification of a juror entitles him to a new trial after verdict. This convenient and necessary rule has been applied by this court, not only to a juror disqualified by interest or relationship; Jeffries v. Randall, 14 Mass. 205; Woodward v. Dean, 113 Mass. 297; but, even in a capital case, to a juror who was not of the county or vicinage, as required by the constitution. Declaration of Rights, art. 13. Anon. cited by JACKSON, J., in 1 Pick. 41, 42.

"The same rule has been applied by other courts to disqualification by reason of alienage, although not in fact known until after verdict. Hollingsworth v. Duane, 4 Dall. 353; S. C. Wall. C. C. 147; State v. Quarrel, 2 Bay, 150; Presbury v. Commonwealth, 9 Dana, 203; The King v. Sutton, 8 B. & C. 417; S. C. nom. The King v. Despard, 2 Man. & Ry. 406. In the case of the Chelsea Waterworks Co., 10 Exch. 731, BARON PARKE said: "In the case of a trial by a jury *de medietate linguae*, which by the forty-seventh section of the jury act is expressly reserved to an alien, he may not know whether proper persons are on the jury; yet if he was found guilty, and sentenced to death, the verdict would not be set aside because he was tried by improper persons, for he ought to have challenged them."

sider that the plaintiff was a poor man; for which a new trial was granted, and the writer taken up and committed; but here this seems only an invitation, and an endeavor for a full jury to appear, in order to avoid *a tales;* and a man may write in behalf of his daughter. But the doubt with me is on the compliment here paid to the jurymen by so great a man as the Duke of Leeds. And he thought the fact hardly justifiable even in a father.

This case was argued in Easter Term last, and likewise in this term:

And now it was resolved by HOLT, Chief Justice, POWELL, POWYS, and GOULD, Justices, that no new trial should be granted; because the defendant, having notice of such a letter long before the trial, might have moved for a trial at bar, which the other side had offered to consent to. But taking the letter as it is in itself, it is of dangerous consequence; for it is a temptation to the jury to be partial, and takes off their indifferency. But secondly, if a party have cause of challenge, and know of it time enough before the trial, if he do not challenge, he shall not have a new trial;[1] *contra* if he has not timely notice of it. The party himself cannot give a juryman money to appear; for it cannot be supposed that he will hire him to give a verdict against himself.

The motion was denied.

And note, HOLT, Chief Justice, in delivering his opinion cited a case in the time of Edward the Third, where a new trial was granted, because a great lord concerned in the cause sat upon the bench at the trial.

RICE v. THE STATE.

16 Indiana, 298. [*1861.*]

WORDEN, J. Indictment against the appellant for assault with intent to murder. Motion to quash overruled. Trial, conviction and judgment; a new trial being denied. * * *

[1] The same rule is applied to cases of misconduct on the part of the jury during the progress of the trial. Wood v. Moulton, 146 Cal. 317; State v. Barrington, 198 Mo. 23.

But see Craig v. Pierson Lumber Co., 169 Ala. 545.

One of the petit jurors by whom the cause was tried was one of the grand jurors who found the indictment. It sufficiently appears that the defendant, as well as his counsel, was ignorant of this fact until after the return of the verdict. The juror was, at the proper time, interrogated as to his competency, and disclaimed having formed or expressed any opinion as to the guilt or innocence of the accused, though he was not asked if he had been a member of the grand jury which found the indictment. The affidavit of the juror himself was filed in support of the verdict, in which he says he had, at the time of being examined, no opinion as to the defendant's guilt, and had forgotten the circumstance of his having been on the grand jury. A new trial was asked on this ground.

We think it clear that the juror was incompetent, and that the defendant was guilty of no negligence in not sooner discovering the fact. Had the incompetency of the juror been known to the accused at the time the jury was accepted and sworn, he could not afterward have been heard to make the objection. Barlow v. The State, 2 Blackf. 114. Here the accused undertook to test the juror's freedom from bias, and being answered by the juror that he had formed no opinion in the case, he was not required to go further, and ascertain whether he had been on the grand jury, or whether he was under any other disqualification. An accused person has a right to presume that the jurors called to try him are competent, and he need not anticipate possible objections unless he has notice that they exist, or has some reason to suppose that they may exist. A person called to serve as a juror may have formed an opinion in the case, and reasonable diligence on the part of the accused requires that he should test the juror in this respect; but having done so, he is guilty of no negligence in relying upon the statements of the juror, and trusting to the State to put him upon trial before an impartial and competent jury. A new trial should have been granted.[1]

Per curiam. The judgment is reversed, and the cause remanded.

[1] See also Bennett v. State, 24 Wis. 57.

WAIT v. MAXWELL.

5 Pickering, 217. [*1827.*]

This was an action of covenant on a deed executed by the defendant's intestate, Abel Wilder, to the plaintiff, dated March 15, 1821, containing the usual covenants of warranty and seisin. The declaration alleged a breach of the covenant of seisin. The defendant pleaded that Wilder was seised and had good right to convey; and issue was joined thereon.

On the trial, before WILDE, J., the defendant, to prove the seisin of the intestate, offered in evidence a deed to him from Dorothy Kemp, dated May 24, 1819.

The plaintiff contended that this deed was void, Dorothy being under guardianship at the time of executing it; and he offered in evidence certain proceedings in the Probate Court in June, 1818, by which it appeared that the selectmen of Shelburne, upon an inquisition made, certified that she was superannuated and incapable of taking care of herself, and that the judge of probate thereupon appointed guardians over her. It did not appear that she had notice of the inquisition about to be made. The defendant contended that these proceedings in the Probate Court were not sufficient to avoid the deed of Dorothy, and the judge was of that opinion.

The plaintiff then introduced witnesses to show that Dorothy, at the time of executing the deed, was *non compos mentis;* and the defendant introduced as a witness one Wells, on whose application the proceedings in the Probate Court were had, who testified that Dorothy was as capable of understanding and transacting business as most people of her age. On this evidence it was left to the jury to decide as to her capacity to make a valid deed; and the jury were instructed that in weighing the evidence touching this point they had a right to take into consideration the proceedings of the Probate Court, although the same were not conclusive to show that Dorothy was *non compos mentis.*

A verdict was found for the plaintiff; but if the decisions of the judge were wrong a new trial was to be granted.

PARKER, C. J. The decree of the Court of Probate, granting letters of guardianship, is void, because it does not appear that any notice was given to the subject of it before the inquisition

taken; nor is there any judgment or decree ascertaining that she was *non compos*. Probably the proceedings of the Probate Court would have been rejected from the evidence if a motion to that effect had been made at the trial. They were objected to only as proving conclusively the incapacity of Dorothy Kemp, and the objection was sustained by the court; but the proceedings remained in the case and made part of the evidence committed to the jury. A new trial is not necessarily to be granted because evidence has been introduced into a cause, which, if liable to objection, ought upon motion to have been rejected, not even if such evidence is commented upon by the judge; for it sometimes happens that evidence, which would be inadmissible if objected to, is admitted by consent; and if the judge is not called upon to decide on its competency, it ought to be considered as tacitly assented to. If this were not the rule, it would be in the power of parties to put the adversary to expense and delay by trying the chance of a verdict in their favor, and if they fail, of obtaining a new trial; which would be injurious to the rights of the party gaining the verdict. Besides, if the evidence offered is objected to, it may be supplied by other evidence, or the party who offers it may abandon his cause in that stage of the proceedings without incurring additional expense. It should be understood, therefore, that unless the court is moved for the rejection of evidence, it must be considered that all objections are waived, and that no relief can be had after the verdict, on the ground of the incompetency or informality of the evidence. And the same rule will be observed in relation to the charge of the judge respecting such evidence, if he is not specially asked to consider it as not belonging to the case, on account of inadvertency in the counsel in suffering it to pass without objection.

We are satisfied, however, that the verdict has been returned upon a wrong principle, and that it is within the discretion of the court to grant a new trial, notwithstanding the point on which we decide was not distinctly raised at the trial. The deed of Dorothy Kemp was not void, but only voidable. It conveyed a seisin to the grantee, defeasible by her, her heirs or devisees, when entry should be made to avoid it. The issue therefore was maintained by the defendant, for the only point was whether Wilder was seized when he conveyed to the plaintiff. It is very clear that he was, according to the effect given to deeds of

bargain and sale by our statute. Had Dorothy been actually under guardianship when she made the deed, it would have been otherwise, as the decree and letters of guardianship would have taken from her all capacity to convey; but there was no such decree or letters, the whole proceedings on that subject being null and void; so that the presumption of law was in favor of her capacity, and her deed was valid, until by entry or action the grantee was ousted or the deed avoided.

We think, as the rule of damages would be different on the other covenants in the deed, there ought to be a new trial, with leave to the plaintiff to amend by adding a count or counts on the other covenants, and that if the defendant prevails he should recover no costs for the term at which the former trial was had.

New trial granted.[1]

CREASE v. BARRETT.

1 Crompton, Meeson & Roscoe, 919. [*1835.*]

PARKE, B. On the motion for a new trial, in this case, on the ground that Lord LYNDHURST received improper evidence for the plaintiff, and rejected admissible evidence for the defendant, several points were made, all of which have been disposed of, either on the motion for a rule *nisi* or on the argument on showing cause, except three. * * *

The last objection is that the declaration of the prince contained in a lease of February, 1798, was improperly rejected. In the description of the parcels in that lease from the prince to Thomas Carlyon, they are described as separated on the east side from a common called Boscundle Common, the land of Mr. Carlyon, by certain stone posts; and it was therefore contended that this amounted to an admission that Boscundle Common, the land in which the mines in question were worked, was Mr. Carlyon's. * * *

This admission certainly falls under that description, inasmuch as it is an admission that the surface of the *locus in quo* under which the plaintiff now claims the minerals, on the ground

[1] See also Nulton v. Croskey, 111 Mo. App. 18; Standard Oil Co. v. Ins. Co., 79 N. Y. 506; McCann v. Ullman, 109 Wis. 574.

that it was part of the wastes of the manor in 1798, was at that time private property.

It may be that the supposed admission may be readily explained, and may not weigh in the least against the very strong evidence of the right of the prince to the mines in question, from the actual perception of toll from them for a considerable period; but we cannot on this account refuse to submit the question to the consideration of another jury. The authority of Doe d. Lord Teynham v. Tyler (4 M. & Pa. 377; 6 Bing. 561) was quoted to show that the court have a power to refuse a new trial where evidence has been improperly rejected, if in their judgment the rejected evidence ought to have no effect, and there is enough to warrant the verdict against the party on whose behalf that evidence was offered, supposing it to have been admitted. Something to the same effect had fallen from Sir James MANSFIELD in 1 Taunt. 14, and from Lord TENTERDEN in Tyrwhitt v. Wynne (2 B. & A. 559). But we cannot help thinking that the rule is there laid down much too generally; and it is obvious that if it were acted upon to that extent the court would in a degree assume the province of the jury; and besides its frequent application would cause the rules of evidence to be less carefully considered, and the litigant parties would in all probability have on most occasions recourse to bills of exceptions for the rejection or reception of improper evidence; a course productive of great delay and inconvenience. In some cases, no doubt, the court may refuse a new trial when the witness has been improperly rejected, as where the fact which such evidence was to establish was proved by another witness, and not disputed, Edwards v. Evans (3 East, 451), or where, assuming the rejected evidence to have been received, a verdict in favor of the party for whom it was offered would have been clearly and manifestly against the weight of evidence, and certainly set aside upon application to the court as an improper verdict.

We cannot say, however strong our opinion may be on the propriety of the present verdict, that, if the lease had been received, it would have had no effect with the jury; nor that it is clear beyond all doubt, if the verdict had been for the defendant, that it would have been set aside as improper; and therefore we think that there must be a new trial.

Rule absolute.

WALDRON v. WALDRON.

156 U. S. 361. [*1894.*]

Mr. Justice WHITE. * * *

We come now to the last contention, which is this, that, conceding misuse was made of the record and other evidence, yet, as the misuse was corrected by the final charge of the court, therefore the error was cured. Undoubtedly it is not only the right but the duty of a court to correct an error arising from the erroneous admission of evidence when the error is discovered, and when such correction is made, it is equally clear that, as a general rule, the cause of reversal is thereby removed. State v. May, 4 Dev. (Law) 330; Goodnow v. Hill, 125 Mass. 587, 589; Smith v. Whitman, 6 Allen, 562; Hawes v. Gustin, 2 Allen, 402, 406; Dillin v. People, 8 Michigan, 357, 369; Specht v. Howard, 16 Wall. 564. There is an exception, however, to this general rule, by virtue of which the curative effect of the correction, in any particular instance, depends upon whether or not, considering the whole case and its particular circumstances, the error committed appears to have been of so serious a nature that it must have affected the minds of the jury despite the correction by the court. The rule and its exception were considered in Hopt v. Utah, 120 U. S. 430, 438, where the foregoing authorities were cited, and the principle was thus stated by Mr. Justice FIELD: "But, independently of this consideration as to the admissibility of the evidence, if it was erroneously admitted its subsequent withdrawal from the case with its accompanying instruction cured the error. It is true that in some instances there may be such strong impressions made upon the minds of the jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission; and in that case the original objection may avail on appeal or writ of error. But such instances are exceptional." * * * The case here, we think, comes within the exceptions.

Judgment reversed.

TILLY MIL' v. WHARTON.

2 Vernon, 378. [*1700.*]

Wharton on a plea of *non est factum* had obtained a verdict on a bond of £3000 penalty for payment of £1500, and there not being sufficient personal assets, Wharton brought a bill to have a trust of lands executed in aid of the personal estate. The defendant insisted the bond was forged, and had made a strong proof of it; but that being the point tried at law, the court would not enter into the proof thereof, or permit the depositions to be read; but admitted if the witnesses had been convicted of perjury, or the party of forgery, that might have been a just ground for relief in equity, especially since the prosecuting of attaints was become in a manner impracticable; but upon an appeal to the House of Peers a new trial was directed,[1] and the bond found to be forged.

FABRILIUS v. COCK.

3 Burrow, 1771. [*1765.*]

This was an action of trover for 6000 pagodas, of the value of 8s. each, or £2400 sterling, in which a verdict had been given for the plaintiff for £2400 at *nisi prius* in Middlesex, before Lord MANSFIELD.

On Friday, 25th of January last, Mr. Serjeant Davy, on behalf of the defendant, moved for a new trial.

The plaintiff was a Dane, and the case he made at the trial was "that he had escaped from a Danish settlement in the East Indies with 6000 pagodas quilted about his body." (He was present in court; walked to and fro, with great agility, and then showed he had 6000 pieces of lead, of the size of pagodas, concealed and fastened about his body.) That he came aboard one of our East India ships, of which the defendant was mate, and that he had deposited these pagodas with him.

[1] See also Seward v. Cease, 50 Ill. 228.

Some Danish sailors, who were aboard, swore to circumstances which proved his having the pagodas and putting them into the defendant's hands. Great stress was laid upon the confusion the defendant appeared to be in, when the money was demanded of him. A witness, who called himself a Danish consul, swore to circumstances in support of the plaintiff's case.

The defendant always denied the whole story; but was not able to contradict the proof at the trial. So the jury, to the satisfaction of Lord MANSFIELD, found a verdict for the plaintiff for £2400, the value of the pagodas.

The defendant moved for a new trial, upon the ground "that the whole was a fiction, supported by perjury, which he could not be prepared to answer. That since the trial many circumstances had been discovered to detect the iniquity, and to show the subornation of the witnesses." [1]

The court, after a very strict scrutiny, on Monday, the 11th February last, granted a new trial on payment of costs.

The justice and propriety of this determination appeared in a very strong light to many persons, who thought the whole story to be manifestly a scheme of villainy, supported by perjury. And the plaintiff never dared to try it again.

And now (this 9th of November, 1765), on Mr. Davenport's motion, the plaintiff not having proceeded, a rule was made for

Judgment as in case of a nonsuit.

[1] LORD MANSFIELD, in Petrie v. Milles, 3 Douglas, 27: "Secondly, he says, if he had been apprised, he could have answered the plaintiff's case at the trial, for he has two witnesses who might have been produced; but it is not stated who those witnesses are, nor what they could have proved, nor is there any affidavit by them. Lastly, the defendant says that an indictment for perjury has been found against the witness for the plaintiff. This is another instance of the mischief which would ensue if proceedings were to be stayed in consequence of the finding of a bill for perjury. The bill is found entirely on *ex parte* evidence, and is no proof that the charge is true. Neither the nature of the perjury nor the names of the witnesses who are to support the indictment are stated, but it appears that the defendant himself is one of those witnesses. The first instance in which an application of this kind was successful in the case of the pagodas (Fabrilius v. Cock, 3 Burr, 1771). It was a clear and certain perjury, and suspected by the court at the trial, and the witness ran away.

"These are all the grounds of the application. It seems a most audacious one, and the rule ought to be discharged with costs."

See also Sly v. Union Depot Co., 134 Mo. 681.

RICHARDSON v. FISHER.

7 Moore, 546. [*1823.*]

This was an action for goods sold and delivered, in which the plaintiff sought to recover from the defendants the amount of certain articles furnished to them, as part owners of two vessels called the Harriet and Thetis. * * *

His lordship left it to the jury to say to whom the credit was originally given; they thought, from the testimony of the notary, that it was given to the defendants, and accordingly found a verdict for the plaintiff.

Mr. Serjeant Pell having, in the last term, obtained a rule *nisi*, that this verdict might be set aside and a new trial granted, on the ground that the verdict was against evidence, but chiefly on the above affidavit of the notary. * * *

Lord Chief Justice DALLAS. Why did you call him as a witness, if you did not consider his evidence to be material? The question was not, who were the legal owners, but to whom was the credit originally given by the plaintiff; and it appeared from his own books that Bagshaw and Seale only were debited, and not the defendants. Independently of this, I am of opinion that there must be a new trial, as the notary has since sworn that he was mistaken as to one of the defendants being the person who employed him to prepare the bills of sale.

DEXTER v. HANDY.

13 Rhode Island, 474. [*1881.*]

DURFEE, C. J. This is a petition for a new trial of an action pending in the Court of Common Pleas, in which a verdict was found for the plaintiff. The action is case for slander. The words declared on as slanderous reflect on the plaintiff's character for chastity and accuse her of a specific act of fornication. The defense was that the words were true. On the trial the plaintiff called two witnesses who testified to her good character, and also a witness who testified in disproof of the alleged act of fornication. The ground of the petition is that these witnesses, after

the trial was over, severally admitted that their testimony was untrue. The affidavits of persons who profess to have heard these admissions are filed in support of the petition, but no affidavits are produced from the witnesses themselves either admitting that their testimony was false or stating anything differently from their testimony, while, on the contrary, one of the witnesses, and he the most important, has given an affidavit denying that he ever made the admissions. If another trial were granted, the new evidence would not be admissible in proof of the issue made by the defendant, but only to contradict or discredit the witnesses if they were again put on the stand by the plaintiff. A new trial is seldom granted for the introduction of newly discovered testimony which goes merely to impeach the witnesses of the prevailing party. We confess that the petition does not commend itself to our minds. If the affidavits introduced by the petitioner are true, the witnesses have confessed themselves perjurers; and yet the petitioner, while he asks us to grant him a new trial on that account, has not, so far as appears, taken any steps to have them prosecuted. It has been decided that a new trial on account of perjury will not be granted until after the perjured witness either has been convicted or is dead, mere evidence of the perjury, or even an indictment for it, being deemed insufficient. Dyche v. Patton, 3 Jones Ep. 332; Benfield v. Peters, 3 Doug. 24; Seeley v. Mayhew, 4 Bing. 561; Wheatley v. Edwards, Lofft. 87. Perhaps the rule laid down in these cases may be too strict and exacting for all circumstances, but it is obviously founded in wise policy. Certainly the talk of a witness after trial ought not generally to weigh against his sworn testimony; for there would be no security for verdicts if, without peril to the witnesses, they were liable to be upset by such talk. The best evidence of perjury is the conviction of the perjurer. It is against the petition that the petitioner can find no precedent for it. There is, however, precedent against it. In Commonwealth v. Randall, Thacher Cr. Cas. 500, it was held that expressions used by a witness after a trial, contradicting or denying what he said in court, are not ground for setting aside the verdict and for granting a new trial, but are evidence to convict him of perjury. "In almost every instance," said the court, "it would be easy for a losing party to obtain affidavits of that description." We must therefore refuse a new trial on this ground.

The other ground for a new trial is the discovery of new testimony of a different kind. The petition, however, does not show that the testimony might not, with proper diligence, have been had at the trial. Moreover, the testimony is of but slight importance, and goes rather to the matter of damages than to the question primarily at issue. Ham v. Taylor, 22 Texas, 225; Schlencker v. Risley, 4 Ill. 483. We do not think it furnishes a sufficient ground for a new trial. The petition is therefore dismissed with costs.

Petition dismissed.

ANDERSON v. GEORGE.

1 Burrow, 352. [*1757.*]

Upon a rule for the plaintiff to show cause "Why a verdict obtained by him for £16 should not be set aside, and a new trial ordered, upon payment of costs."

The case appeared to be, that the plaintiff had sold goods to the defendant, who paid for them by a promissory note of one Hopley, which the defendant indorsed. The plaintiff demanded the money of Hopley, but indulged him with a further day of payment, several times, till Hopley broke.

The only dispute between the parties was, "Which of them ought to bear the loss of this note." For the plaintiff was paid, if the loss ought to fall upon him, through his neglect or indulgence in giving further credit to Hopley.

There were two counts in the declaration: one, for goods sold; the other, against the defendant as indorser of the promissory note.

When the cause came on to be tried, though both parties came to try the real merits of the question between them, viz., "which should bear the loss of the note occasioned by Hopley's failure;" and the plaintiff's agents had the note in court; yet finding upon their own evidence, "that the plaintiff had given repeatedly further credit to Hopley," they resorted to a trick, and rested their case upon proving the sale and delivery of the goods, which never was disputed. The defendant could not produce the note; it was in the plaintiff's custody. Relying upon its being the only ground of the plaintiff's case, the defendant had

not given him notice "to produce it." The count stating it, could not be given in evidence, and the defendant had not entitled himself to prove the contents, for want of notice to produce it. Lord MANSFIELD told them, at the trial, it was an improper artifice; that no verdict could stand, which was so obtained. But the plaintiff refused to produce the note and had a verdict of course.

It was now contended, for the plaintiff, that the verdict was regular, and the plaintiff in no fault; for, without notice, he was not obliged to produce the note. Therefore the verdict ought not to be set aside.

The court thought the plaintiff had taken an unfair advantage, contrary to justice and good conscience. That the rules of practice must be general; but he who abused them in a particular case, should not shelter a trick, by regularity. The plaintiff did not want notice to produce a note he had in court, and which he had laid in the declaration as his ground of action. Besides, he took a verdict for the price of the goods; though he had received satisfaction, the evidence of which was in his own custody and suppressed.

They not only set aside the verdict; but set it aside without payment of costs and declared, "the next time that a party should obtain a verdict in like manner, by an unfair, unconscionable advantage, without trying the real question, they would set aside the verdict, and make him pay the costs."

A new trial being ordered, this cause was tried at Guildhall, the sittings after this term, and the defendant had a verdict upon the merits, to the satisfaction of everybody, the case being clear beyond a doubt.

COOKE v. BERRY.

1 Wilson, 98. [*1745.*]

Assumpsit upon a promissory note, defendant pleaded that the plaintiff accepted of some chests of tea in satisfaction, upon which issue was joined, and there was a verdict for the defendant. It was now moved on behalf of the plaintiff by Sir John Strange and Mr. Crowle for a new trial, upon an affidavit that

the plaintiff took this to be a sham plea, and that he had a letter under the defendant's own hand, wherein it appears the defendant had disposed of the tea to another person, and wherein the defendant says he will pay the plaintiff his money due upon the note, which letter the plaintiff did not produce at the trial, thinking the plea was a sham, and that the defendant could not possibly prove it.

But *per curiam*. New trials are never granted upon the motion of a party, where it appears he might have produced and given material evidence at the trial if it had not been his own default, because it would tend to introduce perjury, and there would never be an end of causes if once a door was opened to this. Suppose in a *scire facias* upon a judgment, the defendant has a release, he is summoned, and has an opportunity of pleading it, and does not, he shall never have an *audita querela*. This is a very strong case at bar, for the plaintiff has notice of the defense of the defendant in his plea, and ought to have come prepared to falsify it at the trial. And DENNISON, J., said, he remembered a case of a horse plea, where the defendant pleaded he gave the plaintiff a horse in satisfaction; plaintiff looked upon it as a horse (or sham) plea indeed, but the defendant at the trial proved it a true plea. Rule to show cause why there should not be a new trial was discharged.

BROADHEAD v. MARSHALL, EX'R OF HAGGET.

2 Wm. Blackstone, 955. [*1774.*]

Case by a coachmaker for a bill due to him by the testator, a West Indian, from 1767 to 1773. He had delivered two bills, one for job-work to the amount of £121, and for £40, "promised to be paid if any gentleman or lady would say that a coach which he made for the testator was worth £200, and that Lady Ashton said it was;" total, £161. The other bill was for £121, job-work, and £200 for a coach, giving credit for £160 received by him on account the 18th of March, 1772; balance, £161. On this last bill the action was brought in Hilary Term last, and tried at the sittings after Easter Term, when the jury found a verdict for the plaintiff; damages £161.

Davy now moved for a new trial, on the affidavit of Ramsden, the defendant's attorney, stating that the defendant sailed for Barbadoes on the 20th of April, last, being the first day of Easter Term. That since the trial he had discovered in a memorandum-book of the defendant a receipt in these words, and signed by the plaintiff:

"Received of Mr. James Marshall, on the 18th of March, 1772, the sum of £160 in full for a coach made for William Hagget, Esq. per
£160. THOMAS BROADHEAD."

(Marshall was an agent of Hagget, and managed his affairs in his lifetime, and his wife was constituted his executor at his decease in July, 1773.) Ramsden further swore, that at the time of the trial he did not know that he had such receipt in his custody, nor that any receipt had been given by the plaintiff to the defendant, or the said Mr. Hagget, on any account whatsoever.

Whitaker and Walker showed cause. But on the special circumstances of the case, and the discovery of the new and very material evidence above stated, the court made the rule absolute for a new trial. But the next day, on the plaintiff's agreeing to remit £40 of the damages, the court, by consent, discharged the rule.

TURQUAND v. DAWSON.

1 Crompton, Meeson & Roscoe, 709. [*1835.*]

Assumpsit for goods sold and delivered. Plea: The general issue. At the trial, before TAUNTON, J., at the last assizes for the county of Derby, the plaintiff was nonsuited, owing to the absence, as it was contended, of one Bosworth, a material witness. It appeared that previously to the trial, which took place on Thursday, the last day of the assizes, there had been a negotiation between the parties for the settlement of the action, but that such negotiation went off on the Wednesday, and that the plaintiff on that day was aware that the evidence of Bosworth would be required. He was accordingly sent for, but his residence being at Manchester, he did not arrive until after the

trial had taken place, and the assizes terminated, on the Thursday. In Michaelmas Term, Whitehurst obtained a rule to show cause, why the nonsuit should not be set aside and a new trial had, on the ground, amongst others, that by the fraud and practice of the defendant's attorney, the plaintiff had been prevented from securing the attendance of Bosworth at the trial.

Lord ABINGER, C. B.—The plaintiff, under the circumstances stated, should have applied to the judge to postpone the trial of the cause; and the rule that such an application shall not be granted at the request of the plaintiff, is not so inflexible but that, under peculiar circumstances, it may be departed from. If the learned judge had refused to grant the application, the plaintiff might then have withdrawn the record. But he cannot be permitted to take his chance of success by trying the cause first, and then obtaining a new trial in case of failure.

Rule discharged.[1]

GARDNER v. MITCHELL.

6 Pickering, 113. [*1828.*]

At the term of this court held at Nantucket in July, 1827, the plaintiffs recovered a verdict for $5,337, in an action brought for an alleged breach of contract on the sale of two parcels of oil, one of 1,000 barrels, the other of 50,000 gallons, which oil was warranted by the defendant to contain twenty-eight parts

[1] SHELDON, J., in Kendall v. Limberg, 69 Ill. 355:

"It is lastly urged that the court erred in not granting a new trial, on the ground of newly discovered evidence.

"As to Williams, who was with defendant at the time of the alleged arrest, his testimony was known to defendant previous to the time of the trial, and it is only his place of residence that has been discovered since the trial. The defendant should have made an application for a continuance, on account of not having been able to procure the testimony of this witness, instead of voluntarily going into the trial without it. And, as to all the newly discovered testimony, it is not conclusive in its character, and is merely cumulative, and contradictory of plaintiff's witnesses, and does not afford ground for a new trial, according to the well-settled rule upon the subject. Smith v. Shultz, 1 Scam. 491; Martin v. Ehrenfels, 24 Ill. 187; Adams v. The People, 47 Ill. 376.

"The judgment will be affirmed."

in a hundred of head matter, and to be of a fair merchantable quality. The plaintiffs introduced evidence tending to show that the oil delivered was deficient in quantity and quality, and that it did not contain the stipulated proportion of head matter. The defendant now moved for a new trial, on the ground of newly discovered evidence. * * *

Per curiam. The bar are aware that the court look with jealousy upon applications like this, as it has become so common to apply for a new trial because the verdict was against evidence, or on account of evidence discovered since the trial, and it is so easy to procure new evidence to suit the case. And yet it is absolutely necessary that the court should have a control over verdicts, for sometimes they seem to be given unaccountably against the manifest justice of the case.

This action is brought upon a contract of sale of a quantity of oil, with a warranty that it should be of a merchantable quality, and should contain a certain proportion of head matter. It is alleged that the contract was not performed in regard either to the quantity or the quality of the oil delivered. The court have been obliged to look into the whole evidence, in order to see the applicability of that which has been newly discovered. The plaintiffs introduced evidence which seemed very strong, and if it had been believed, the damages should have been $20,000 or $30,000 instead of $5,000. On the other hand, it appeared that after the oil had been partly manufactured, so that the plaintiffs could have ascertained its quality, they entered into a reference solely in regard to the quantity delivered, nothing being said of the quality. Two persons, one appointed by the plaintiffs and the other by the defendant, were employed to gauge the oil, and in gauging it is quite easy to ascertain the quality. There was evidence likewise that if the oil had been as bad as it was represented by the plaintiffs, it would have been impossible to manufacture it into candles; nevertheless it was all sold before the trial, and the purchasers have made no application to the plaintiffs on account of its bad quality. We should have considered it at least a balanced case, notwithstanding the strong evidence on the part of the plaintiffs. Then comes the recently discovered evidence, upon which the application for a new trial is grounded. This is somewhat of a critical matter, as a party may so readily obtain new evidence to supply former deficiencies. Still the court ought not to shut their eyes to

injustice on account of facility of abuse in cases of this sort. The evidence now brought forward is of confessions of the plaintiffs, and the question is whether it is new or only cumulative. If only cumulative, it does not furnish a sufficient cause for a new trial. This is the ground taken in New York, and the reason is that the party should have taken care to produce evidence enough to establish his point. But this evidence is of a different character. As to the body oil, which is made a subject of complaint, there is a confession of one of the plaintiffs that it was as good as he expected. This is a new fact which was not before in the case. The verdict was general, and apparently injustice has been done; and this being upon the trial a nicely balanced case, we think it should go again before the jury, with this new evidence.

New trial granted.

WRIGHT v. SOUTHERN EXPRESS CO.

80 Federal Rep. 85. [*1897.*]

HAMMOND, J. (after stating the facts). Being dissatisfied with the verdict, which on the proof was not expected by the court, and at the same time seriously averse to interfering with the right of trial by jury merely because the court is disappointed by the verdict, the ground of newly discovered testimony offers a plausible and somewhat tempting excuse to direct a new trial. If, however, that were the only ground, it would be refused, for the proof offered does not at all justify a new trial for that reason, when we carefully scrutinize it. It may be doubtful if there has been any judicial adjudication of the plaintiff's insanity, and probably it was only an administrative determination, with judicial sanction, as between hospitals. The affidavits do not disclose the facts with sufficient fullness to exhibit the technical character of the proceeding; but, suppose there were an adjudication as upon a writ *de lunatico inquirendo,* it ought to have been produced at the trial. Due diligence is required in all cases, and testimony is not newly discovered, in the sense of the law of new trials, merely because the party did not know of it at the time. There must be more than this, and it must appear that by due diligence it could not have been discovered, or,

rather, that after due diligence it had not been discovered, in time for the trial. There was known to be a question about the plaintiff's sanity, and the fact that it was rumored that she had been in an asylum was well known to the defendant company. It was contented with such proof as was given at the trial, and did not, as it should have done, follow up the plaintiff's life, and discover, as could easily have been done, the facts about the confinement in an asylum; the proceedings, judicial or other, upon which it was had; her release on habeas corpus, if such were the fact; the nature of her malady, and all there was or is concerning it. That this was not done is obviously a want of due diligence, because, in the very nature of it, the facts could not be concealed from ordinary inquiry in and about the places where she had been, and of the persons who knew of her life and its surroundings. In Carr v. Gale, 1 Curt. 384, 5 Fed. Cas. 116, Mr. Justice CURTIS says that "it cannot be considered as the use of due diligence to suffer a trial to proceed, and after a verdict against him proceed to make the inquiries which he might and ought to have made before." Price v. Jones, 3 Head, 84; Martin v. Nance, Id. 649; Shipp v. Suggett, 9 B. Mon. 5. Moreover, in this case, as in that, the testimony offered is only cumulative. The court can well see how much more potential it would have been if the defendant had proved that the plaintiff had been adjudicated a lunatic, had been in an asylum, and had left it unimproved in the opinion of the asylum authorities, and how much more effective this proof may have been with the jury than the opinions of the clergymen and one of her own doctors that she was "crazy" or "unbalanced," etc.; but still it would have had no other than a cumulative effect in that direction upon the issue of the condition of her mind. * * *

SECTION 2. MOTION OR APPLICATION.

REYNOLDS v. SIMONDS.

Barnes' Notes, 446. [*1740.*]

Skinner for Defendant moved for a new Trial after the first four Days of Term. *Per Cur.:* The Application comes too late.

We have determined that these Motions shall never be received after the four Days.[1] No Rule.

BIRT v. BARLOW.

1 Douglas, 171. [*1779.*]

This was an action of trespass and assault, for criminal conversation with the plaintiff's wife. It was tried before BLACKSTONE, Justice, at the last Assizes for Kent, when, by the direction of the judge, the plaintiff was non-suited.

On Monday, the 26th of April, Rous moved for a rule to show cause why the non-suit should not be set aside, and a new trial granted.

Wednesday, the 21st of April, was the first day of the term, and, by the practice of this court, all new trials (in causes tried in vacation), must be moved for within four days of the beginning of the term, including the first; so that Saturday, the 24th of April, was the last day for moving. However, Rous having stated that he had understood that the four days were reckoned exclusive of the first, and BLACKSTONE, Justice, having desired at the trial, that the opinion of the court should be taken, the court entertained the motion, which was founded on the rule of a misdirection in point of evidence; and the rule was granted.[1]

* * *

[1] Mo. R. S. 1909, § 2025:

"Motions for a new trial to be filed, when.—All motions for new trials and in arrest of judgment shall be made within four days after the trial, if the term shall so long continue; and if not, then before the end of the term (R. S. 1899, § 803)."

[1] See also Rex. v. Holt, 5 Term Rep. 436; Williams v. Judges, 5 Mo. 248. But in order to obtain a review under the statute of the order refusing a new trial, the motion must be filed within the proper time. Bollinger v. Carrier, 79 Mo. 318. At common law it was error to enter judgment before the expiration of the four days. Standfast v. Chamberlaine, 3 Salk. 215; but under the modern practice it is not unusual to enter judgment upon the return of the verdict, and thereafter set it aside if the motion is sustained.

GANT v. SHELTON.

3 B. Monroe (Ky.), 420. [*1843.*]

Chief Justice EWING delivered the opinion of the court.

This is an action of assumpsit, for the price of a horse purchased by Gant, of Shelton, in the fall of 1840, at $100, "to be paid for when Van Buren should get the electoral vote of Virginia for President."

The defendant pleaded three pleas: * * *

Upon these pleas issues were taken, and a verdict and judgment for the plaintiff, and the defendant has appealed to this court.

There are numerous palpable errors in this record, some of which we will notice.

The Circuit Court refused to hear a motion for a new trial, suggesting as the only reason of the refusal, that it was not made in time. We know of no rule of law in this State which precludes a party, who conceives himself injured by the finding of the jury, from moving the court for a new trial at any time during the term at which the verdict is found.[1]

We would not say that the court might not establish a rule of practice, which would require such motions to be made in some reasonable time, while the evidence and steps taken in the cause were fresh in the recollection of the court and counsel; yet such rule, if made, should be spread upon the records of the court, or promulgated in some form, so as to apprise litigants or their counsel of its existence. No such rule is shown, in this record, to have been made or promulgated in any form. * * *

C. & N. W. RY. v. DIMICK.

96 Illinois, 42. [*1880.*]

Mr. Justice CRAIG delivered the opinion of the court:

This was an action on the case, brought by appellee, administrator of the estate of Gilbert H. Dimick, deceased, against appellant, to recover damages for the death of the deceased, caused by the negligence of appellant's servants.

[1] See, also, Felton v. Spiro, 78 Fed. 576.

On the trial the jury returned a verdict in favor of plaintiff for $3500, and under the statute then in force several special findings on questions of fact were also returned. The court set aside the general verdict, and rendered judgment in favor of the defendant, on the ground that the special findings were inconsistent with the general verdict. From that decision the plaintiff prosecuted an appeal to this court, where the judgment of the Circuit Court was reversed and the cause remanded. Dimick v. Chicago and Northwestern Railroad Co., 80 Ill. 338.

After the cause was remanded and placed upon the docket in the Circuit Court, the court, on motion, rendered judgment in favor of the plaintiff, on the verdict, for $3500. The defendant then entered its motion for a new trial, which was overruled, and an appeal taken. * * *

It is, however, contended by appellee that the questions presented by appellant can not be considered by the court, for two reasons: First, the motion for a new trial was not made in time; second, that the motion for judgment on the special findings was a waiver of the right to move for a new trial. The statute provides, where either party desires to move for a new trial, that the motion shall be made before final judgment be entered, or during the term it is entered. The motion in this case was made at the term and before final judgment was rendered on the general verdict. It is true, a judgment had been entered at a previous term in appellant's favor on the special findings. At that time appellant did not want a new trial. It would have been but an idle ceremony for it then to have moved for a new trial. No judgment had been rendered against it, and it was satisfied with the judgment of the court. When, however, that judgment was reversed, and a judgment was sought on the general verdict, then the motion was made for a new trial, and we think it was in apt time.

In regard to the next question, we perceived no reason to sustain the position that appellant waived its right to move for a new trial by moving for judgment on the special findings. Our statute is, in substance, like the statute in Indiana in regard to special findings.

The Supreme Court of Indiana, in passing upon a question similar to this, in Brennan v. May, 42 Ind. 102, said: "They were answers of the jury to particular questions of fact propounded to them, and before moving for a new trial the appel-

lants moved for judgment in their favor on the special findings, which motion was overruled. The counsel for appellee claim that the motion first made cut off the motion for a new trial. Several authorities are cited to show that a motion in arrest of judgment cuts off a motion for a new trial, but we are not aware of any holding that a motion for judgment in one's favor on the special finding of the jury works such a result. We think where there is a general verdict with special findings by the jury in answer to questions propounded to them, the party against whom the general verdict is returned may move for judgment in his favor on the special findings notwithstanding the general verdict, without losing his right to move for a new trial in case his motion for judgment should be overruled. The doctrine that a motion in arrest of judgment cuts off a motion for a new trial, though well settled in this State, is somewhat technical, and we are not disposed to extend it to cases of motion like that under consideration."

This case seems to be directly in point, and we have no hesitation in approving the doctrine therein announced.

For the error indicated the judgment will be reversed, and the cause remanded.

Judgment reversed.

L. & N. RY. CO. v. McCOY.

81 Kentucky, 403. [*1883.*]

Chief Justice HARGIS delivered the opinion of the court.

In the beginning collision of counsel renders it necessary to determine what questions are, by the grounds for new trial and assignment of errors, presented to the court for its decision.

According to Section 340, Civil Code, there are eight general causes for granting a new trial. Some of these causes are stated in that section with sufficient particularity to be followed specifically in the written grounds which may be filed by a party, but others are so generic that the language of the Code, if literally pursued, would not enable the court to know, with reasonable certainty, what particular error was complained of. This is especially the case with the eighth subsection, which was intended "to cover all errors to which exceptions might be taken,

not embraced by some one of the preceding seven subsections." (McLain v. Dibble & Co. 13 Bush, 298.)

That case holds correctly that the language of the eighth subsections, which authorizes a new trial for "error of law occurring at the trial, and excepted to by the party making the application," was the generalization of the law-makers, and not sufficiently specific to point out the particular error which might be intended by the written grounds. That subdivision makes every error of law which may be committed, and properly excepted to during the trial, a cause for a new trial. Hence, when the cause for new trial is embraced by it, the particular ground or cause must be named in the written grounds with such a degree of certainty that a person of good understanding may know what is meant. Among other grounds for a new trial, the appellant relied upon the following:

Fifth. The court erred in law in refusing to submit to the jury the questions propounded by defendant's counsel.

Seventh. The court erred in the instructions to the jury.

These grounds are embraced by the eighth subdivision of Section 340 of the Code, and, as we think, are sufficiently specific to indicate the errors of which the appellant complains. There were only three questions which appellant asked to be propounded, and only two instructions which were given by the court to the jury. The questions and instructions all relate to negligence, its degrees, character, and by whom committed, and, it seems, should be considered together in order to understand the meaning of the court below. If more particularity were required in stating grounds for new trial than the appellant has used, the courts must finally become entangled in the uncertainty which generally belongs to human expression, and as each case is presented to different judges whose minds differ in the understanding of the force or meaning of language, the rule regarding the sufficiency of grounds for new trial will be found to vary as much as their mental conceptions. This vague and misgiving state of the rule, which should be uniform and certain, as far as the subject will admit, was never contemplated by the lawmakers. The object of the motion and grounds for new trial is to call the attention of the trial court to any error that may have been committed at the trial, and to allow an opportunity, without the expense and delay of an appeal, of correcting it. This being so, all that is necessary in any case is to

use such plain and intelligible language in the grounds for new trial as indicates, points out, or shows to the court, with reasonable and ordinary certainty, the particular errors which are complained of, so as to enable the court, by the exercise of proper attention, to understand what errors are meant, and to reconsider the facts or law out of which they are alleged to have grown. Unreasonable particularity or technical accuracy in the description of the errors, is not required or practicable, either in the grounds for new trial or the assignment of errors.

To describe each error, with every particularity belonging to it, would swell the grounds for new trial, and the assignment of errors beyond their necessary or proper compass.

The law does not mean that the grounds for new trial shall contain a particular description of the errors relied on, but that the particular errors shall be simply pointed out or indicated in a common-sense way.

Often, and most generally, a few well chosen, substantive, or strong words referring to the subject, and the action of the court thereon, will point out or name the error or errors as well as the most lengthy description. The court could hardly fail to know what errors the appellant relied on by the grounds for new trial above quoted.

There is no objection to pointing out or designating each instruction and each question conceived to be erroneously given or refused, and this is certainly a safe course to pursue; but where the questions or instructions relate to the same general question and its various phases, it is nearly always important to take a view of the whole in order to understand the defects or omissions of any one of them, and a ground for new trial referring to them in the plural number is sufficiently specific.[1]

[1] GRAVES, J., in Collier v. Lead Co., 208 Mo. 246:

"It is not necessary to review the many cases cited from other jurisdictions. The practice in this State has never, of recent years, required the motion for new trial to point out specifically the evidence excluded or evidence admitted, alleged to have been erroneously excluded or admitted. Under our practice it is sufficient, if at the time of the exclusion or admission of such evidence, proper objections were made and exceptions saved, and this followed by a general assignment of error in this regard in the motion for new trial. Such have been the last expressions of this court, and we see no good reason for a further review of the question."

But see SIMMONS, C. J., in Gate City Gas. Co. v. Farley, 95 Ga. 796:

Where there are several issues and various questions of a different nature, then, it may be, a general reference to the instructions or questions would not be specific enough to guide the mind of the court to the supposed error. In such instances sharp practice, or an effort to embrace some error by an indefinite or too general ground, without descending to particulars, could be discovered with but little trouble, and cut off by the application of the rule in the sense we have attempted to explain it above.

The assignment of errors, however, comprehends several alleged errors, which were not alluded to in the grounds for new trial, and they will not, therefore, be considered.

But those quoted, and some other grounds which it will be necessary to mention in this opinion, are specified with ordinary and sufficient particularity, and will be examined. * * *

MOSS v. VROMAN.

5 Wisconsin, 147. [*1856.*]

By the court, SMITH, J. The only exception taken to the ruling of the court below in this case, and the only error assigned is, upon overruling the motion for a new trial.

The motion was predicated upon the ground of surprise, and of newly discovered evidence, but does not disclose such evidence. Upon this latter ground, therefore, the motion should fail. Whenever a motion for a new trial is based upon newly discovered evidence, that evidence should be particularly set

"In the present case there are thirty-two grounds in the motion for a new trial, several of which are wholly superfluous, being so vague, general and indefinite as not to indicate the errors alleged to have been committed; such, for example, as the following: 'Because the court erred, in that the court illegally withheld from the jury material evidence against the demand of the defendant.' 'Because of the illegal admission of material evidence to the jury against the demand of the defendant.' 'Because the presiding judge delivered to the jury erroneous instructions against the defendant on material points.' 'Because the court refused to give pertinent legal instructions to the jury in the language requested by the defendant, such request having been submitted in writing.' We have frequently held that such grounds as these will not be considered."

forth, so that the court may judge of its materiality. This was not done, and the motion, for this assigned cause, was properly overruled.[1]

In regard to the allegation of surprise, we are not able to perceive upon what it is in fact predicated. It appears that the evidence upon which the plaintiff below recovered was his book account verified by his oath. This was objected to, and received "for what is was worth," but no exception was taken to its reception in this manner. It was equivalent to deciding that the testimony was competent in kind, and the weight or effect thereof was to be left to the jury. No exception was taken to this ruling, and the presumption is that it was acquiesced in by the defendant below. * * *

CUNNINGHAM v. BELL.

5 Mason (U. S. C. C.), 161. [*1828.*]

Assumpsit brought by the plaintiffs (John A. Cunningham and William J. Loring), who are merchants in Boston, Massachusetts, against the defendants (James C. Bell and others), who are merchants in Leghorn, in Tuscany, for breach of orders as factors and commission merchants. The declaration contained various counts. Plea, the general issue. The material facts as they appeared at the trial, upon the points of law in controversy, are summed up in the charge of the court; and it is thought unnecessary to report them, or give them more in detail. * * * After the verdict, a bill of exceptions was tendered to the court and signed; and a motion for a new trial was also made by the counsel for the defendants. On its coming on for argument

STORY, Circuit Justice, said: The motion for a new trial cannot be entertained, according to the practice of the court, unless the bill of exceptions is waived.[1] The party has his election,

[1] See King. v. Gilson, 206 Mo. 264, where the trial court sustained the motion.

[1] Accord, Doe v. Roberts, 2 Chitty, 272 (1818).

MR. JUSTICE MCLEAN, in U. S. v. Hodge, 6 Howard (U. S. Sup.) 279: "The motion for a new trial was not a waiver of a writ of error. In some of the circuits there

either to proceed upon a writ of error to the Supreme Court, in order to have it determined there whether the points were correctly ruled at the trial; or waiving that remedy, to apply here for a new trial. But he cannot be permitted to proceed both ways. The ground for granting a new trial is, that the party is without other remedy. But that is not the case, where he files a bill of exceptions; for upon that he can take the opinion of the Supreme Court. It is most convenient for the due administration of justice, that where a party means to apply to the appellant court for a final decision of the law of his case, he should do so with the least delay. The other party ought not to be burthened with the expenses of successive trials, until the law of the case is definitely settled by the final tribunal.

Motion overruled.

HUMPHREY'S ADM'R v. WEST'S ADM'R.

3 Randolph (Va.), 516. [*1825.*]

Judge COALTER delivered the opinion of the court.

The court is of opinion, that the only question for the consideration of the court, on a demurrer to evidence, is whether the evidence supports the issue or not; and the judgment is that it does, or does not, support it. After the demurrer is joined, the jury may either be discharged, and (if the judgment be that the evidence does support the issue) a writ of inquiry of damages is awarded; or the jury then impaneled may go on to assess conditional damages.

But in either case, the question is with the jury, not with the court, as to the question of damages, subject, as in all other cases, to the superintending control of the court, to grant a new trial in case the damages are excessive. That, however, rests with the court, before whom the trial was had, and that, too, upon a motion to that court, for a new trial; there being no case in which that court is bound, *ex mero motu,* and without mo-

is a rule of court to this effect. But effect could be given to that rule only by requiring a party to waive on the record a writ of erorr, before his motion for a new trial is heard. In the greater part of the circuits no such rule exists. It does not appear to have been adopted in Louisiana."

tion, to grant a new trial, and subject the defendant, without his consent, to greater damages. The Appellate Court cannot grant such new trial; for that would be to reverse the judgment of an inferior court, on a motion for a new trial here, which was not made to that court, and of course, on a matter in which that court committed no error. * * *

YARBER v. C. & A. RY. CO.

235 Illinois, 589. [*1908.*]

Mr. Justice DUNN delivered the opinion of the court:

This was an action on the case brought by appellee, against appellant, to recover damages for personal injuries. Judgment against appellant has been affirmed by the Appellate Court, and a further appeal is prosecuted to this court.

The gist of the various counts of the declaration is, that appellant failed to furnish appellee a safe place in which to work, and that the foreman, who was a vice-principal, ordered him into a dangerous place. * * *

It is also contended that no error concerning the admission of evidence or the giving of instructions can be insisted upon, because no exception was preserved to the order of the court overruling the appellant's motion for a new trial. Conceding that no exception was preserved to the order overruling the motion for a new trial, exceptions were preserved to the giving and refusal of instructions and the admission of evidence, and the action of the court in these respects is therefore open to review. In order to bring the question of the sufficiency of the evidence to sustain the verdict before this court for review it is necessary for the losing party to make a motion for a new trial, and, upon its being overruled, to except to such ruling, and to include such motion, the order overruling the same, and his exception thereto, together with the evidence, in the bill of exceptions; but the propriety of giving or refusing instructions or the admission or rejection of evidence where the rulings of the court thereon have been excepted to and incorporated in the bill of exceptions has always been subject to review, regardless

of the fact that no motion for a new trial was made.[1] (Illinois Central Railroad Co. v. O'Keefe, 154 Ill. 508.) In a number of the later decisions of this court it has been held that it is necessary, before an Appellate Court can consider any question of the admission or sufficiency of evidence or error in giving or refusing instructions, that a motion for a new trial should have been made and overruled and an exception preserved to the order overruling that motion. Among the cases so holding are East St. Louis Electric Railroad Co. v. Cauley, 148 Ill. 490; Illinois Central Railroad Co. v. Johnson, 191 id. 594; Chicago, Burlington and Quincy Railroad Co. v. Haselwood, 194 id. 69; Chicago and Eastern Illinois Railroad Co. v. Schmitz, 211 id. 446; Call v. People, 201 id. 499.

Such ruling is a departure from the practice of the common law, to which the motion for a new trial was originally unknown. The writ of error issued out of chancery was a commission to the judges named in it to examine the record and to affirm or reverse the judgment according to law. No writ of error lay for an error in law not appearing upon the face of the record, and therefore, where a party alleged anything *ore tenus* which was overruled by the judge, this could not be assigned for error. There was no bill of exceptions, and therefore no ruling on the admission or rejection of evidence, error in the charge of the court, or objection of any kind arising on the trial, could be alleged for error because it did not appear on the record, and so the party aggrieved had no remedy. The law was amended in this respect by the statute of Westminster 2 (13 Edw. I, Chap. 31), which provides that "when one impleaded before any of the justices alleges an exception, praying they will allow it, and if they will not and he that alleges the exception writes the same and requires the justices will put to their seals, the justices shall do so, and if one will not another shall; and if, upon complaint made of the justices, the king cause the record to come before him, and the exception be not found in the roll, with the seals of the justices thereto put, the justice shall be

[1] In a number of states the code or practice act is construed as requiring a motion for a new trial to bring exceptions to the attention of the trial court a second time before they can be reviewed by an appellate court. For a review of the legislation on this point in Missouri, see State v. Marshall, 36 Mo. 400. See also Armstrong v. Whitehead, 81 Miss. 35, reviewing similar legislation in that state.

commanded to appear at a certain day either to confess or deny his seal, and if he cannot deny his seal they shall proceed to judgment according to the exception, as it ought to be allowed or disallowed." Bacon's Abridgement, Bill of Exceptions; Raymond on Bill of Exceptions, 31 Law Library.

The bill of exceptions was upon a matter of law arising on the trial and not upon any question of fact, and judgment was required to be given on the writ of error according to the exception as it ought to be allowed or disallowed. But no question of fact could be drawn into examination again by a bill of exceptions. The common law processes for reviewing judgments do not draw into question any fact which has been already pronounced upon,—they aim only to correct errors of law. The motion for a new trial was not only unnecessary, it was practically unknown. The method of challenging the verdict of the jury was by writ of attaint, under which a jury of twenty-four was summoned to determine whether the first jury had sworn falsely in giving their verdict. If the verdict was found to be false, the jurors were condemned to perpetual infamy, forfeiture of goods, imprisonment, and other severe punishments. (3 Blackstone's Com. 402.) It was not until the middle of the seventeenth century that the practice of granting new trials upon motion began to prevail, the first case of a new trial granted upon the merits being Wood v. Gunston, Style, 466. (3 Blackstone's Com. 388; Hilliard on New Trials, 4.) The object of the motion for a new trial was not to review any error of law committed by the court, but was to review the question of fact as found by the jury. The granting or denial of the motion was entirely discretionary with the court. No exception could be taken to the decision thereon, nor could it be assigned for error. In the courts where the practice in this respect has not been modified by statutes this is still so. In the Federal courts the appellate tribunal will not look into the evidence to determine whether or not it sustains the verdict. Barr v. Gratz, 4 Wheat. 213; Blunt's Lessee v. Smith, 7 id. 248; Henderson v. Moore, 5 Cranch, 11; Marine Ins. Co. v. Young, id. 187; Home Ins. Co. v. Bartoro, 13 Wall. 603; Terre Haute and Indianapolis Railway Co. v. Struble, 109 U. S. 381; Kearney v. Snodgrass, 12 Ore. 311; Miller v. Baker, 20 Pick. 285; Burd v. Dunsdale, 2 Bin. 90.

The law, then, in the absence of any statute, did not authorize

the taking of an exception to the overruling of a motion for a new trial, and the practice in this State was in accordance with this rule until the passage of the act of June 21, 1837 (Laws of 1837, p. 109), Section 2 of which authorized exception to be taken to the overruling of motions for new trials and the assignment of error on any opinion so excepted to. Before that time this court uniformly held the granting or refusing a new trial a question to be determined in the sound discretion of the court to which the application was addressed and a refusal to be no ground of error. (Clemson v. Kruper, Beecher's Breese, 210; Collins v. Claypole, id. 212; Street v. Blue, id. 261; Adams v. Smith, id. 283; Vernon v. May, id. 294; Harmison v. Clark, 1 Scam. 131; Johnson v. Moulton, id. 532.) In Smith v. Shultz, 1 Scam. 490 (decided after the passage of the act of 1837), the court said, referring to an assignment of error on the overruling of a motion for a new trial: "At common law the decision of a court upon an application addressed to its discretion cannot be assigned for error, and such has been the uniform decision of this court. But by an act of the Legislature this principle of the law has been changed, and an appeal will now lie from the decision of a court refusing an application for a new trial." But the right of exception in this case being entirely statutory, the order of a court granting a new trial is still, as at common law, not reviewable, because the statute allows exceptions only to the overruling of motions for new trials. Brookbank v. Smith, 2 Scam. 78. * * *

It thus appears that the rule announced in the later cases above cited, and others, that a motion for a new trial is necessary to preserve for review rulings upon the evidence and instructions duly excepted to, is out of harmony with the principles of the common law and the earlier practice of our courts. The statute has, however, modified, to some extent, the common law practice in regard to the method of review by bill of exceptions. What is now Section 77 of the Practice act has been in force in its material parts, substantially as at present, since 1827. It directs the party moving for a new trial to file the points in writing, particularly specifying the grounds of his motion. We have held that this section is directory, and not mandatory. The party moving for a new trial may be required by the court or the opposite party to file the points in writing, specifying the grounds of his motion. If this is not required

and the motion is submitted without any statement in writing of the grounds therefor and without objection, the requirement of such statement is waived. If certain points in writing particularly specifying the grounds of a motion for a new trial have been filed, the party will be deemed to have waived all causes for a new trial not set forth in his written grounds and in the Appellate Court will be confined to the reasons specified. On the other hand, if the motion has been submitted without specifying, in writing, the grounds therefor, the party may avail himself of any cause for a new trial which may appear in the record, whether it be the admission or rejection of evidence, the giving or refusal of instructions, the lack of sufficient evidence or any error occurring on the trial. (Ottawa, Oswego and Fox River Valley Railroad Co. v. McMath, 91 Ill. 104; Consolidated Coal Co. v. Schaefer, 135 id. 210; Hintz v. Graupner, 138 id. 158; Brewer Brewing Co. v. Boddie, 162 id. 346; Bromley v. People, 150 id. 297; Chicago, Paducah and Memphis Railroad v. Goff, 158 id. 453; Landt v. McCullough, 206 id. 214; Kehl v. Abram, 210 id. 218.) As was said in West Chicago Street Railroad Co. v. Krueger, 168 Ill. 586, these cases are, however, to be distinguished from those cases in which no motion for a new trial was made, as in Illinois Central Railroad Co. v. O'Keefe, 154 Ill. 508, and cases there recited. In a very recent case, while it was stated that the rule is firmly established that when a motion for a new trial is made and points relied on stated therein all other points are thereby waived, it was carefully stated that errors in giving or refusing instructions, when exceptions have been properly taken, are saved without a motion for a new trial. Chicago City Railway Co. v. Smith, 226 Ill. 178.

Under the practice in this State, decisions of the court made in the progress of a trial upon instructions, objections to evidence, or other matters of law arising in the cause which have been incorporated in a bill of exceptions, may be assigned for error and reviewed by an Appellate Court without any motion for a new trial. They are not waived by making a motion for a new trial if such motion is submitted without any points stated in writing. But if a motion is made for a new trial and the grounds thereof are stated in writing, the party is limited to those reasons and all other errors are deemed to have been waived. In this case a motion for a new trial was made, specifying the grounds thereof, among others the admission of im-

proper evidence and the giving of improper instructions. The exceptions taken to the decision of the court in these particulars were therefore not waived and are available to the appellant, whether exception was taken to the order overruling the motion for a new trial or not.

For the errors indicated the judgments of the Appellate Court and the Circuit Court will be reversed and the cause remanded to the Circuit Court for a new trial.

Reversed and remanded.

CHAPTER VII.

BILLS OF EXCEPTIONS.

Statute of Westminster, 2. [*13 E. I. c. 31.*] [1]

When one that is impleaded before any of the justices doth allege an exception, praying that the justices will allow it, which if they will not allow, if he that alleged the exception do write the same exception, and require that the justices will put to their seals for a witness, the justices shall so do; and if one will not, another of the company shall. And if the king, upon complaint made of the justices, cause the record to come before him, and the same exception be not found in the roll, and the plaintiff show the exception written, with the seal of a justice put to, the justice shall be commanded that he appear at a certain day, either to confess or deny his seal. And if the justice cannot deny his seal, they shall proceed to judgment according to the same exception, as it ought to be allowed or disallowed.

MONEY v. LEACH.

3 Burrow, 1692. [*1765.*]

Soon after the court sat, the Lord Chief Justice PRATT came personally into court, to confess *(ore tenus)* his seal put to a bill of exceptions in this case; pursuant to the requisition of the following writ, viz.:

[1] 2 Institutes, p. 426: "At the common law, before the making of this act, a man might have had a writ of error for an error in law, either *in redditione judicii, in redditione executionis,* or *in processu,* etc., and this error in law must be apparent in the record, etc. For the writ of error saith, *quia in recordo et processu,* etc., *error intervenit manifestus,* etc., or for error in *fait,* by alleging matter out of the record, as death of either party, etc., before judgment; now the mischiefs before this statute was, that when the demandant or

"GEORGE the third, &c.—To our trusty and well-beloved Charles Pratt, knight, our chief justice of the bench, greeting. —Whereas we have lately been informed that in the record and process and also in giving of judgment in a plaint which was in our court before you and your associates, our justices of the said bench, by our writ, between Dryden Leach, and John Money, James Watson, and Robert Blackmore, in a plea of trespass, assault, and imprisonment, manifest error hath intervened, to the great damage of the said John, James, and Robert; which said record and process, for the error aforesaid, we have caused to be brought into our court before us; and now, on the behalf of the said John, James, and Robert we are informed, in our said court before us, that at the trial of the issue first joined between the said parties in the plea aforesaid, the council learned in the law of the said John, James, and Robert alleged on their behalf certain exceptions to the opinion then declared and given by you; and that the said exceptions were then and there written in a certain bill, to which you put your seal, at the request of the said John, James, and Robert, according to the form of the statute in such case made and provided; and the said John, James, and Robert have brought into our court before us the said bill with your seal put to the same as it is said; whereupon the said John, James, and Robert have besought us to do what further should seem meet to be done in this behalf, according to the form of the said statute; and forasmuch as by the said statute it is ordained that in such case the justice whose seal shall be put to such exception be commanded to appear before us at a certain day, to confess or deny his seal: therefore we command you that you personally appear before us, on the morrow of the ascension of our Lord, wheresoever we shall then be in England, to confess or deny the seal so put to the said bill of exceptions as aforesaid to be your seal, according to the form and effect of the said statute; and that you bring with you, at the same

plaintiff, or the tenant or defendant did offer to allege any exception (as in those days they did *ore tenus* at the bar), praying the justices to allow it, and the justices overruling it so as it was never entered of record, this the party could not assign for error, because it neither appeared within the record, nor was any error in *fait*, but in law, and so the party grieved was without remedy, for whose relief this statute was made."

time, this writ. Witness William Lord Mansfield, at Westminster, the 24th of April in the fifth year of our reign."[1]

N. B. The bill of exceptions, sealed by Lord Chief Justice PRATT, had been previously brought into this court, and was now in the hands of Mr. Owen, as secondary of the office of pleas: and all the proceedings, down to and including the above-mentioned writ, were entered upon the rolls of this court.

The Lord Chief Justice PRATT being now come into this court, pursuant to the command contained in the said writ, delivered it to the Lord Chief Justice of this court; Mr. Owen, at the same time, delivering the original bill of exceptions into Lord Mansfield's hand. Whereupon Lord Mansfield, showing to Lord Chief Justice PRATT the seal thereto affixed, asked him "whether that was his lordship's seal, or not." To which question, his lordship answering in the affirmative, Lord Mansfield redelivered the bill of exceptions to Mr. Owen; at the same time delivering to him the above-mentioned writ, with orders "that it should be filed."

Note—There was no written return to this writ: but Mr. Owen proposes to indorse it—"Sir Charles Pratt, knight, the chief justice within named, personally appeared in the court of the lord the king before the king himself, &c., on the day of the return within written; and confesseth that the seal put to

[1] In case a judge refused to seal a bill of exceptions, the statute furnished a cumbersome remedy—Bridgman v. Holt, Shower's Cases in Parliament, 143: "By the Statute of Westminster 2, c. 31. In case the judge refuses, then a writ to command him, which is to issue out of chancery, *quod apponat sigillum suum;* and then a writ to own or deny his seal.

"By 2 Inst. 426, the party grieved by the denial may have a writ upon the statute, commanding the same to be done *juxta formam statuti,* Reg. 182 Fitz. *Natura Brevium* 21 and 11 H. 4, 52, 65. There's the form of the writ set out at large. It recites a surmise of an exception taken and overruled, and it follows *vobis præcipimus, quod si ita est, tunc sigilla vestra apponatis. Si ita,* 'tis conditional, if the bill be true and duly tendered, then this writ; and if it be returned, *quod non ita est,* then an action for a false return, and thereupon the surmise will be tried. And if found to be so, damages. And upon such a recovery, a peremptory writ commanding the same. That the law is thus seems plain; though no precedent can be shown of such a writ, 'tis only for this reason, because no judge did ever refuse to seal a bill of exceptions; and none was ever refused, because none was ever tendered like to this, so artificial and groundless. But that such actions lie upon this statute, were cited Regst. 174, Nat. Br. 10."

the bill of exceptions within mentioned is his seal."

The lord chief justice of the Common Pleas immediately retired, without sitting down: and the lord chief justice of this court attended him till he was got past the puisne judge, but not quite to the door of the court.

WRIGHT v. SHARP.

1 Salkeld, 288. [*1709.*]

A Corporation-book was offered in evidence at the assizes to prove a member of the corporation not in possession, and refused. No bill of exceptions was then tendered, nor were the exceptions reduced to writing; so the trial proceeded, and a verdict was given for the plaintiff. Next term the court was moved for a bill of exceptions, and it was stirred and debated in court. It was urged that the law requires *quod proponat exceptionem suam*, and no time is appointed for the reducing it into writing, and the party is not grieved till a verdict be given against him; and the same memory that serves the judges for a new trial will serve for bills of exceptions. Vide 2 Inst. 437. N. B. 21. 540 b. Vet. Intr. 96, 136. Raymond 405. Brownl. Red. 433. 2 Lev. 236. Stat. West. 2. c. 31. On the other side it was said that this practice would prove a great difficulty to judges, and delay of justice; that the precedents and entries suppose the exception to be written down upon its being disallowed, and the statute ought to be construed so as to prevent inconvenience; besides, the words of the act are in the present tense, and so is the writ formed on the act. HOLT, C. J. If this practice should prevail, the judge would be in a strange condition: He forgets the exception, and refuses to sign the bill, so an action must be brought: You should have insisted on your exception at the trial: You waive it if you acquiesce, and shall not resort back to your exception after a verdict against you, when perhaps, if you had stood upon your exception, the party had other evidence, and need not have put the cause on this point: The statute indeed appoints no time, but the nature and reason of the thing requires the exception should be reduced to writing when taken and disallowed, like a special verdict, or

a demurrer to evidence; not that they need be drawn up in form; but the substance must be reduced to writing while the thing is transacting, because it is to become a record: So the motion was denied.

EX PARTE MARTHA BRADSTREET.

4 Peters (U. S. Sup.), 102. [*1830.*]

At January term 1829, on motion of Mr. Key, and on affidavit filed, the court granted a rule on the honorable Alfred Conklin, district judge of the northern district of New York, to show cause why he did not sign a certain bill of exceptions tendered to him on the part of the plaintiff, in the case of James Jackson ex. dem. of Martha Bradstreet vs. Daniel Thomas; which cause had been tried before him, and a verdict given for the defendant. The rule was made returnable on the second Monday in January of this term. The same rule was obtained in the case of Jackson ex. dem. of Martha Bradstreet vs. Joseph Kirkland.

To this rule the district judge, on the 10th of December, 1829, returned with the bills of exceptions which had accompanied the copy of the rule as served upon him, his reasons for refusing to comply with the demand of the plaintiff. * * *

The return set forth, that at the time of the trial of the cause mentioned in the rule, no bill of exceptions was tendered, nor were any exceptions reduced to writing, except by himself in the minutes which he kept of the trial; unless, which was probable, the counsel also noted them in their minutes. Several weeks after the trial, the amended bill of exceptions, accompanied by a paper containing numerous amendments proposed by the counsel for the defendant, was delivered to him for correction; and he thereupon proceeded, with due deliberation, and with the aid of his notes of the trial, to correct and settle the same, in conformity, as nearly as possible, with the truth of the case. No counsel appeared for either party, and no application was made for some time for the bill of exceptions by the counsel in the cause. In an amended return, the district judge stated that some correspondence had taken place with Mrs. Bradstreet, in relation to alterations proposed to be made in the bill

of exceptions; and in an interview with her, nothing was said by her which was understood as an intimation of her intention or wish to be heard further upon the subject.

The return then proceeds to state, that in the bill of exceptions, as proposed by Mrs. Bradstreet, many alterations had been made in terms and language, of little importance, and matters are introduced as having occurred on the trial, which did not occur, circumstances are misstated, and opinions are imputed to him which he did not express; and thus many parts of the amendments proposed by the plaintiff were untrue; and that therefore the same were not signed by him. The particulars to which these representations refer are stated in the return.

The return, after stating that in reference to an instrument of writing produced in the cause, in the bill of exceptions as signed by the judge, a brief description of the instrument was inserted, instead of the whole, *in extenso*, which had been done in conformity with the established rules of practice, requiring only so much of the evidence offered upon the trial as is sufficient fully and fairly to present every question of law embraced in the exception, proceeds—

"In conclusion, I have only to add the expression of my conviction, that although this rule of law has by no means been rigidly applied in abridging this bill, it has in no instance been departed from to the prejudice of the plaintiff."

"If, however, on a particular examination of the bill and amendments (without which, I may be permitted to remark, it is impossible to form a just conclusion), your honorable court should, in regard to the documentary evidence, entertain a different opinion, I shall most cheerfully obey its mandate to correct the supposed error."

Mr. Storrs, on a motion to discharge the rule, stated that this court would never require a judge to sign a bill of exceptions which he considers incorrect. The court will adopt another course, and will leave it to the judge to re-examine the bill, and to do what he shall consider proper. * * *

Mr. Chief Justice MARSHALL delivered the opinion of the court.

The court is unanimously of opinion that the rule ought not to be granted.

This is not a case in which the judge has refused to sign a bill of exceptions. The judge has signed such a bill as he thinks

correct. If the court had granted a rule upon the district judge to sign a bill of exceptions, the judge could have returned that he had performed that duty. But the object of the rule is, to oblige the judge to sign a particular bill of exceptions, which had been offered to him. The court granted the rule to show cause; and the judge has shown cause, by saying he has done all that can be required from him; and that the bill offered to him is not such a bill as he can sign.

Nothing can be more manifest, than that the court cannot order him to sign such a bill of exceptions. The person who offers a bill of exceptions ought to present such a one as the judge can sign. The course to be pursued is, either to endeavor to draw up a bill, by agreement, which the judge can sign; or to prepare a bill to which there will be no objection, and present it to the judge.

The court will observe, that there is something in this proceeding which they cannot, and which they ought not to sanction. A bill of exceptions is handed to the judge several weeks after the trial of the cause, and he is asked to correct it from memory. The law requires that a bill of exceptions should be tendered at the trial. But the usual practice is to request the judge to note down in writing the exceptions, and afterwards, during the session of the court, to hand him the bill of exceptions, and submit it to his correction from his notes. If he is to resort to his memory, it should be handed to him immediately, or in a reasonable time after the trial. It would be dangerous to allow a bill of exceptions of matters dependent on memory, at a distant period, when he may not accurately recollect them. And the judge ought not to allow it.

If the party intends to take a bill of exceptions, he should give notice to the judge at the trial; and if he does not file it at the trial, he should move the judge to assign a reasonable time within which he may file it. A practice to sign it after the term must be understood to be a matter of consent between the parties, unless the judge has made an express order in the term, allowing such a period to prepare it.

It is ordered by the court that the mandamus as prayed for be, and the same is hereby refused; and that the rule heretofore granted in this cause be, and the same is hereby discharged.

MÜLLER v. EHLERS.

91 U. S. 249. [*1875.*]

Mr. Chief Justice WAITE delivered the opinion of the court.

It perhaps sufficiently appears from the bill of exceptions in this case, if it is to be taken as a part of the record, that the rulings complained of were excepted to in proper form at the time of the trial; but it does not appear that the bill of exceptions was filed, signed, tendered for signature, or even prepared, before the adjournment of the court for the term at which the judgment was rendered. No notice was given to the plaintiff of any intention on the part of the defendants to ask for the allowance of a bill of exceptions, either during the term or after. No application was made to the court for an extension of time for that purpose. No such extension of time was granted, and no consent given.

Upon the adjournment for the term the parties were out of court, and the litigation there was at an end. The plaintiff was discharged from further attendance; and all proceedings thereafter, in his absence and without his consent, were *coram non judice*. The order of the court, therefore, made at the next term, directing that the bill of exceptions be filed in the cause as of the date of the trial, was a nullity. For this reason, upon the case as it is presented to us, the bill of exceptions, though returned here, cannot be considered as part of the record.

This case differs very materially from that of United States v. Breitling, 20 How. 253. There the bill of exceptions was prepared during the term, and presented to the court for allowance four days before the adjournment. It was handed back to the attorney presenting it, three days before the adjournment, with the request that he submit it to the opposing counsel. Delay occurred, and the signature was not actually affixed until after the term. Under the special circumstances of that case, the signature, after the term, was recognized as proper. The particular grounds for this ruling are not stated; but it was probably for the reason that, upon the facts stated, the consent to further time beyond the term for the settling of the exceptions might fairly be presumed. That case went to the extreme verge of the law upon this question of practice, and we are not inclined to extend its operation. It was said by this court in

Generes v. Bonnemer, 7 Wall. 565, that "to permit the judge to make a statement of the facts on which the case shall be heard here, after the case is removed to this court by the service of the writ of error, or even after it is issued, would place the rights of parties who have judgments of record entirely in the power of the judge, without hearing and without remedy." This language is substantially adopted in Flanders v. Tweed, 9 Wall. 425, where it was said "the statement of facts by the judge is filed upon the 29th May, 1868, nearly three months after the rendition of the judgment. This is an irregularity, for which this court is bound to disregard it, and to treat it as no part of the record."

As early as Walton v. United States, 9 Wheat. 651, the power to reduce exceptions taken at the trial to form, and to have them signed and filed, was, under ordinary circumstances, confined to a time not later than the term at which the judgment was rendered. This, we think, is the true rule, and one to which there should be no exceptions without an express order of the court during the term or consent of the parties, save under very extraordinary circumstances. Here we find no order of the court, no consent of the parties, and no such circumstances as will justify a departure from the rule. A judge cannot act judicially upon the rights of parties, after the parties in due course of proceeding have both in law and in fact been dismissed from the court.

The judgment is affirmed.[1]

[1] MR. JUSTICE BLATCHFORD, in Chateaugay Iron Co., Petitioner, 128 U. S. 544: "We are of opinion that the practice and rules of the state court do not apply to proceedings in the circuit court taken for the purpose of reviewing in this court a judgment of the circuit court, and that such rules and practice, embracing the preparation, perfecting, settling and signing of a bill of exceptions are not within the 'practice, pleadings and forms and modes of proceeding' in the circuit court which are required by sec. 914 of the Revised Statutes, to conform 'as near as may be' to the 'practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State' within which the circuit court is held, 'any rule of court to the contrary notwithstanding.' * * * The manner or the time of taking proceedings as a foundation for the removal of a case by a writ of error from one Federal court to another is a matter to be regulated exclusively by acts of Congress, or, when they are silent, by methods derived from the common law, from ancient English statutes, or from the rules and practice of the courts of the United

MALONY v. ADSIT.

175 U. S. 281. [*1899.*]

Action in the U. S. District Court of Alaska to recover certain lands, tried before Hon. A. K. Delany, District Judge, under written stipulation waiving a jury. The court made certain special findings, upon which judgment was entered for plaintiff.

On August 11, 1897, a motion for a new trial was made and overruled. Judgment for the plaintiff was duly entered, and on September 20, 1897, the plaintiff was put in possession of the premises in dispute, in pursuance of a writ of possession allowed by Charles S. Johnson, Judge of the United States District Court, who had succeeded Arthur K. Delany to that office. * * *

On January 4, 1898, a bill of exceptions was filed, to which was appended a statement, signed by the respective counsel, that the bill of exceptions was correct and in accordance with the proceedings had in the trial of the cause; and the record discloses that, on said 4th of January, 1898, the bill of exceptions was settled and allowed by Judge JOHNSON.

Mr. Justice SHIRAS, after stating the case, delivered the opinion of the court.

An inspection of this record discloses that the bill of exceptions was not settled, allowed and signed by the judge who tried the case, but by his successor in office, several months after the trial. It is settled that allowing and signing a bill of exceptions is a judicial act, which can only be performed by the judge who sat at the trial. What took place at the trial, and is a proper subject of exception, can only be judicially known by the judge who has acted in that capacity. Such knowledge cannot be brought to a judge who did not participate in the trial or to a judge who has succeeded to a judge who did, by what purports to be a bill of exceptions, but which has not been signed and allowed by the trial judge.

Section 953 of the Revised Statutes is as follows: "A bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the

States. The only regulation made by Congress as to bills of exceptions is that contained in sec. 953 of the Revised Statutes, which provides that they shall be sufficiently authenticated by the signature of the presiding judge, without any seal."

cause was tried, or by the presiding judge thereof, if more than one judge sat at the trial of the cause, without any seal of court or judge being annexed thereto."

We understand this enactment to mean that no bill of exceptions can be deemed sufficiently authenticated unless signed by the judge who sat at the trial, or by the presiding judge if more than one sat.

In Mussina v. Cavazos, 6 Wall. 355, 363, after the case had been elaborately argued on the merits, it was discovered by the court that the bill of exceptions had not been either signed or sealed by the judge below. Thereupon the court delivered the following opinion: "Whatever might be our opinion of the exceptions which appear in the record, if they were presented in such a way that we could consider them, we find them beyond our reach. The bill of exceptions, or what purports to be a bill of exceptions, covering more than three hundred and fifty pages of the printed record, is neither signed nor sealed by the judge who tried the cause; and there is nothing which shows that it was submitted to him or in any way received his sanction. We are therefore constrained to affirm the judgment."

Boroscale v. Bosworth, a case reported in 98 Mass. 34, presented a somewhat similar question. There a judge of the trial court took a bill of exceptions that had been substantially agreed on by the parties and duly filed, to examine whether the statement of his rulings was correct, with the understanding that if correct he should allow the bill. However, the judge retained the bill without allowing it for more than a year, and resigned his office without having done so. Afterwards, in such circumstances, a motion was made for a new trial in the trial court, and allowed. To the ruling which allowed a new trial the plaintiffs took an exception and carried the case to the Supreme Judicial Court. That court refused to disturb the order of the court below awarding a new trial, and held that where it appears to the court that a party has been deprived, without his fault, of a right or remedy which the law gives him, it would generally be held a legal reason for granting a new trial. The court cited the English cases of Nind v. Arthur, 7 Dowl. & Lowndes, 252, where upon the death of Mr. Justice COLTMAN, before allowing a bill of exceptions which had been presented to him, a new trial was granted; also Bennett v. P. & O. Steamship Company, 16 C. B. 29, where the settling of a bill of exceptions having

been delayed by the appointment of Chief Justice WILDE as Lord Chancellor, and afterwards by reason of his infirm health all hope of it having been lost, a new trial was granted by the trial court. Also the case of Newton v. Boodle, 3 C. B. 796, where the death of Chief Justice TINDAL prevented the sealing of a bill of exceptions, without laches of the excepting party, was regarded as good ground for a motion for a new trial.

The *rationale* of these cases evidently was that the court of errors could not consider a bill of exceptions that had not been signed by the judge who tried the case, and that such failure or omission could not be supplied by agreement of the parties, but that the only remedy was to be found in a motion for a new trial.

Those cases were cited with approval by this court in Hume v. Bowie, 148 U. S. 245, where it was held that where the judge presiding at the trial of a cause in the Supreme Court of the District of Columbia at circuit dies without having settled a bill of exceptions, it is in order for a motion to be made to set aside the verdict and order a new trial, and that, where such an order is made by the court in general term, it is not a final judgment from which an appeal may be taken to this court. It is true that there is a rule of the Supreme Court of the District of Columbia which provides that in case the judge is unable to settle the bill of exceptions and counsel cannot settle it by agreement a new trial shall be granted, and that this court regard that rule as applying to the case in hand, and that hence a new trial was a matter of course.

In Young v. Martin, 8 Wall. 354, where the exceptions were noted by the clerk of the trial court and so appeared in the record, it was held that "to be of any avail exceptions must not only be drawn up so as to present distinctly the ruling of the court upon the points raised, but they must be signed and sealed by the presiding judge. Unless so signed and sealed they do not constitute any part of the record which can be considered by an Appellate Court."

In Origet v. United States, 125 U. S. 240, 243, the record contained a paper headed "Bill of Exceptions." At the foot of the paper appeared the following: "Allowed and ordered on file, Nov. 22, '83. A. B." And it was held, "This cannot be regarded as a proper signature by the judge to a bill of exceptions, nor can the paper be regarded for the purposes of re-

view as a bill of exceptions. * * * Section 953 of the Revised Statutes merely dispensed with the seal. The necessity for the signature still remains. We cannot regard the initials 'A. B.' as the signature of the judge, or as a sufficient authentication of the bill of exceptions, or as sufficient evidence of its allowance by the judge or court. Therefore the questions purporting to be raised by the paper cannot be considered."

In State v. Weiskittle, 61 Maryland, 51, it was said: "In this State it is not admissible for another judge to pass upon the correctness of his predecessor's ruling in such a case. The new trial will go as a matter of course."

It certainly cannot be contended that if the trial judge is able officially to sign the bill of exceptions, it would be competent for the counsel to dispense with his action, and rely upon an agreed statement of the facts and law of the case as tried. Nor can they agree that another than the trial judge may perform his functions in that regard. In Lynde v. Craney, 95 Michigan, 109, it was said that the practice of stipulating a bill of exceptions without the sanction of the judge cannot be commended; and if such fact be brought to the attention of the court before the argument of the case, the appeal will be dimissed.

In Coburn v. Murray, 2 Maine, 336, it was held that a bill unauthenticated by the trial judge cannot be given validity by consent of counsel.

We are referred to no decision of this court on the precise question whether counsel can stipulate the correctness of a bill of exceptions not signed by the trial judge. But we think that on principle this cannot be done, and we regard the cases just cited as sound statements of the law.

Accordingly, our conclusion is that the errors of the trial court alleged in the bill of exceptions, unauthenticated by the signature of the judge who sat at the trial, cannot be considered by us.[1]

The defendant's demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, having been overruled, and the defendant not having elected to stand on his demurrer, but having availed himself of the leave of the court to file an answer, and his several objections to the admission of evidence at the trial not having been brought be-

[1] See also Fulkerson v. Hauts, 55 Mo. 301.

fore us by a proper bill of exceptions, all that is left for us to consider is whether, on the facts found by the court below, the plaintiff was entitled to judgment. * * *

POMEROY v. STATE BANK OF INDIANA.

1 Wallace, 592. [*1863.*]

Ejectment for certain land in the State of Indiana. There was a verdict and judgment for the defendant, and the plaintiff sued out a writ of error.

Mr. Justice CLIFFORD, after stating the case, delivered the opinion of the court.

Exceptions to the first bill, as written out and sealed, are plainly and undeniably to the overruling of the motion for a new trial, and to the subsequent entry of the judgment and not to the rulings of the court as to the validity of the trust deed or its legal effect as a paramount title over that claimed by the lessors of the plaintiff.

Authorities are numerous that a motion for a new trial in the Federal Courts is a motion addressed to the discretion of the court, and that the decision of the court in granting or refusing it is not the proper subject of a bill of exceptions. Henderson v. Moore, 5 Cran. 11; Mar. Ins. Co. v. Young, id. 187; McLanahan v. The Universal Ins. Co., 1 Pet. 183; U. S. v. Buford, 3 id. 32; Barr v. Gratz, 4 Wheat. 213; Blunt v. Smith, 7 id. 248; Brown v. Clarke, 4 How. 4.

Indeed, the universal rule of practice is that matters resting entirely in discretion are not re-examinable in a court of errors, and there can be no departure from that rule in this court without overruling its settled practice from the organization of the court to the present time. Presumption, therefore, in this court is, that the motion for new trial was properly denied, and if so, then the defendants were entitled to judgment. Ruling of the court was that the trust deed was the paramount title, and to that ruling no exception was taken, and consequently, when the motion for new trial was overruled, the right of the defendants to judgment became complete. Entry of judgment, therefore, was properly made, and the exception to the action of the court

in that behalf, as erroneous, is without any foundation whatever. Error of the court, if any, was in the ruling that the trust deed was the paramount title, and if the plaintiff desired to sue out a writ of error to revise that ruling, he should have excepted to it at the time it was made. Y. & C. Railroad Co. v. Myers, 18 How. 251.

He insists that he did so, because it is so stated in the minutes of the case as appears in the transcript, but the insuperable difficulty in supporting that proposition is, that nothing of the kind appears in the bill of exceptions. Where exceptions are taken to the ruling of the court in the course of a trial to the jury, such an entry is frequently made in the minutes of the case, or of the presiding justice, as evidence of the fact, and as a means of preserving the rights of the party in case the verdict should be against him and he should desire to have the case re-examined in the appellate tribunal, but it was never supposed that such an entry could be of any benefit to the party unless he seasonably availed himself of the right to reduce the same to writing, and took proper measures to have the bill of exceptions sealed by the judge presiding at the trial, or, in other words, such an entry in the minutes can only be regarded as evidence of the right of the party seasonably to demand a bill of exceptions, but it is not the same thing, and has never been so considered in the Federal Courts, or in any other jurisdiction where the rules and practice of the common law prevail.

II. Authority was conferred, by the seventeenth section of the Judiciary act, upon all the courts of the United States, to make and establish all the necessary rules for the ordinary conducting of business in the said courts, provided such rules were not repugnant to the laws of the United States. (1 Statutes at Large, 83.)

Pursuant to that authority the several Circuit Courts, immediately after the judicial system of the United States was organized, adopted the form for bills of exceptions as known at common law, and the practice has been uniformly followed to the present time, without question or any material variation. Bills of exceptions, therefore, in the Federal Courts are required to be drawn as at common law, under the statute of Westminster 2 (13 Edw. I, Chap. 31), passed in the year 1285, and, of course, they must be sealed by the judge, as therein required. 1 Pick.

Stat., 206; 2 Tidd's Practice, 862; 1 Arch. Prac. by Chitty (11th ed.), 443; 2 Inst. 427; 2 Bac. Abr. by Bouvier, 113.

Justiciarii apponant sigilla sua, is the express command of the statute, and so is the commentary of Lord Coke, which has always been regarded as of the same authority as the statute on which it is founded. 2 Inst. 428; Strother v. Hutchinson, 4 Bing. N. C. 89.

Party aggrieved might, before the enactment of that statute, sue out writ of error to correct an error in law apparent on the record, or for an error of fact, where either party had died before judgment; but the writ would not lie for an error in law not apparent on the record, as for a refusal to instruct the jury as requested, or for an erroneous instruction given, or for an erroneous ruling in admitting or rejecting evidence. Consequently, where either party alleged anything *ore tenus,* which was overruled by the court, the party was without remedy; because, being an error in law, and not apparent in the record, the appellate tribunal could not take judicial knowledge of the proceeding. Statute under consideration was passed to obviate that difficulty, and to prevent the injustice flowing from it, and throughout the long period it has continued in force it has ever been regarded as an eminently just and highly beneficial regulation. Writs of error, it is true, bring up the whole record, and it is undeniably competent for the court to reverse the judgment for any apparent error, whether it appear in the bill of exceptions or in any other part of the record. Slacum v. Pomery, 6 Cran. 221; Cohens v. Virginia, 6 Wheat. 410; Garland v. Davis, 4 How. 131; Bennett v. Butterworth, 11 id. 669.

But when a party is dissatisfied with the decision of his cause in an inferior court, and intends to seek a revision of the law applied to the case in a superior jurisdiction, he must take care to raise the questions of law to be revised, and put the facts on the record for the information of the appellate tribunal; and if he omits to do so in any of the methods known to the practice of such courts, he must be content to abide the consequence of his neglect or oversight. Suydam v. Williamson, 20 How. 433.

Unless an exception is reduced to writing and sealed by the judge, it is not a bill of exceptions within the meaning of the statute authorizing it, and it does not become part of the record.

Were it otherwise, then a bill of exceptions would never be

necessary; because if the statement in the minutes is sufficient in one case it must be in all, which cannot for a moment be admitted, as it would overturn the unbroken practice in courts of error from the passage of the statute of Westminster to the present time. Seal, as required, is to the bill of exceptions, and not to each particular exception therein contained. Many exceptions may be inserted in one bill of exceptions, and, of course, it is sufficient if the bill of exceptions is sealed at the close. Accordingly, the practice, in the first and second circuits, is to put every exception taken at the trial into one bill of exceptions, which makes the records less voluminous.

III. Second bill of exceptions, so called, is denominated the "case" in the record, and extends through more than fifty pages of the transcript. First, it contains all of the evidence and exhibits introduced by the lessors of the plaintiff, and the record shows that portions of the same were admitted under the objection of the defendants, and other portions without objection. When objections were made and overruled, it is stated in some instances that the defendants excepted, and in others that statement is omitted. Evidence offered by the lessors of the plaintiff in one instance was rejected, and in that case it is stated that the plaintiff excepted. On the other hand, it contains, in the second place, all the evidence and exhibits introduced by the defendants, whether admitted under objection or without objection, and as in the case of the lessors of the plaintiff, when the objection made was overruled by the court, it is in some instances stated that the plaintiff excepted to the ruling, and in others that statement is omitted. Matters so introduced on the one side and the other consist of judicial records, written instruments, depositions, oral testimony, and certain other facts, either absolutely admitted by the parties or their counsel, or provisionally introduced, subject to the opinion of the court as to their admissibility and legal effect. Rulings of the court, as stated in the first bill of exceptions, are not given, nor is it stated what was the final judgment of the court. Appended to the statement are the signatures of the respective counsel, and the conclusion of the paper is as follows: "This was all the evidence in the case, and the plaintiff prays that this his bill of exceptions may be signed, sealed and made a part of the record herein, which is done," and the same is signed by the presiding justice, and is under his seal.

IV. Nothing further need be remarked to show that no proper foundation is there laid for the revision of the rulings of the court, to which the lessors of the plaintiff now object, because those rulings are not mentioned in the paper, so that even if it could be regarded as a bill of exceptions, it would be equally unavailing to the plaintiff as a means of accomplishing the object he desires. Where the objection is to the ruling of the court, it is indispensable that the ruling should be stated, and it should also be alleged that the complaining party then and there excepted to the same. Both conditions are wanting, and indeed the paper is irregular or defective, and insufficient in many of the substantial elements of a proper bill of exceptions.

V. Suggestion was also made at the argument, that if the paper was not available to the plaintiff, as a bill of exceptions, still the evidence, as reported, might subserve his purpose as an agreed statement of facts; but we think not, for several reasons:

First. Because it merely gives the evidence as it was introduced on the one side and the other, and leaves the results of the evidence to be found by the court, as if sitting as a jury.

Secondly. Because it does not contain the rulings of the court which the plaintiff desires to have revised; and,

Thirdly. Because if both the preceding objections were obviated, still it would not be competent to revise the rulings of the court below in that mode. 2 Tidd's Practice, 896; Seward v. Jackson, 8 Cow. 406.

Decisions of this court establish the rule that writs of error will lie where the judgment in the court below was founded upon an agreed statement of facts, as well as when founded upon the verdict of a jury. U. S. v. Eliason, 16 Pet. 291; Stimpson v. Railroad Co., 10 How. 329; Graham v. Bayne, 18 id. 60.

Judgments of the Circuit Court may also be revised here upon writ of error, in cases where they were founded upon a special verdict, or upon demurrer to evidence. Suydam v. Williamson et al., 20 How. 435; 4 Chitty's Gen. Prac., 7; 2 Inst. 427.

None of the modes suggested, however, enable the complaining party to review or re-examine the rulings of the court, except that of the bill of exceptions. * * *

Affirmed.

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